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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 942.

THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY ET AL., APPELLANTS,

vs.

THE TERRITORY OF NEW MEXICO *EX REL.* BIRD S. COLER AND E. T. CHAPMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED DECEMBER 23, 1907.

(20,946.)

(20,946.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 229.

THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY ET AL., APPELLANTS,

vs.

THE TERRITORY OF NEW MEXICO *EX REL.* BIRD S. COLER AND E. T. CHAPMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 Be it remembered that heretofore, on, to wit, on the 28th day of November, A. D. 1905, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a transcript of record in a certain cause entitled The Territory of New Mexico *ex rel.* Bird S. Coler *et al.*, appellees, *vs.* The Board of County Commissioners County of Santa Fe *et al.*, numbered 1122, which said transcript of record was and is in words and figures following, to wit:

2 In the District Court of the First Judicial District of the Territory of New Mexico in and for the County of Santa Fe.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

Pleas before the Honorable John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the First Judicial District thereof, and of the District Court within and for the County of Santa Fe, in said District.

Be it remembered that heretofore to-wit, on the 22nd, day of August, A. D., 1905, there was filed in the office of the Clerk of the District Court, a petition which petition is in words and figures to-wit:

In the District Court of the First Judicial District, Territory of New Mexico, County of Santa Fe.

No. 4746.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners.

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY, to wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROIVAL, Respondents.

To the Honorable John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the First Judicial District Court thereof.

Come now the above named petitioners and relators by their attorneys, Charles A. Spiess and S. B. Davis, Jr., and respectfully inform this honorable Court as follows:

(1st) That on to-wit, the 24th, day of September, A. D. 1900, Your relators recovered judgment in this Court against the
3 respondents, the board of county commissioners of the county of Santa Fe, in the sum of Sixty Thousand Nine Hundred and Twenty Six and .02-100 Dollars, for and on account of coupons then past due from certain bonds, theretofore issued by the County

of Santa Fe, in the Territory of New Mexico, said judgment being rendered in that certain cause Numbered 4092 on the Civil Docket of Santa Fe, New Mexico, entitled Bird S. Coler and Elverton T. Chapman, plaintiffs, *vs.* The board of county commissioners of the County of Santa Fe, defendant, which said judgment is recorded in book H page 400 of the records of said court a copy of which said Judgment is hereto attached, hereby referred to and made a part hereof, being designated as Exhibit A.

(2nd) That by said judgment is was ordered, among other things that the defendant, the Board of County Commissioners of Santa Fe County, New Mexico, should forthwith cause the said Sixty Thousand Nine Hundred and Twenty Six, and .02-100 Dollars, and the interest thereon due and to become due, at the rate of five per-centum per-annum from said date, to be assessed and levied upon and out of the taxable property situate in the said County of Santa Fe, and to cause the same to be collected in the manner provided by law, and to pay the same out of the treasury of said County to the said plaintiffs, their legal representatives, or assigns, upon the delivery of a proper voucher or vouchers therefor.

(3rd) That no part of said judgment, nor of the interest thereon has ever been paid, and as relators are informed and believe the respondent has wholly failed to collect any sum whatsoever from the taxes or otherwise for the payment of said judgment, and relators are informed and believe that there is now no money or funds whatsoever in the treasury of Santa Fe County, New Mexico applicable to the payment of said judgment and that there is now due and
4 unpaid on said judgment the sum of Seventy Five Thousand Nine Hundred Seventy Four and .72-100 Dollars.

(4th) That the above named respondents, Arthur Seligman, A. L. Kendall and Jose Inez Roival, are the duly elected, qualified and acting county commissioners of the said County of Santa Fe, and as such are charged with the duty under the laws of the Territory of New Mexico of making a levy of taxes and ordering the collection of the same for the purpose of paying said judgment and the interest and costs thereon according to the terms thereof.

(5th) That relators are informed and believe that the said respondents acting as the Board of County Commissioners of said Santa Fe County, at a meeitng held by them during the month of July or August A. D. 1905, made the levy of taxes upon the taxable property of said Santa Fe County, New Mexico, for the purpose of raising funds for the territorial, county, school and other purposes for the year 1905, but relators state the fact to be that the respondents have wholly failed and refuse and still fail and refuse to make any levy whatsoever, for the said year 1905, for the purpose of raising funds to pay the aforesaid judgment and interest and costs thereon.

(6th) That relators, Bird S. Coler and Elverton R. Chapman, are beneficially interested in the said judgment, being the judgment creditors and the present holders of said judgment, and that relators have no plain, speedy or adequate remedy in the ordinary course of law.

Wherefore, your relators pray that a peremptory writ of man-

damus in due form, be at once issued from this court, commanding and requiring the said respondents to convene at the court house in Santa Fe, New Mexico, on or before Thursday the 31st day of August, A. D. 1905, in special session, as the Board of County
5 Commissioners of Santa Fe County, New Mexico, and then and there make special levy of taxes upon all the taxable property within the limits of the County of Santa Fe and Territory of New Mexico of ten mills on each dollar of such taxable property, for the purpose of paying a portion of the judgment aforesaid, with the interest and costs thereon, and that on each and every year hereafter until the said judgment, interest and costs be fully paid, the respondents, the Board of County Commissioners of the County of Santa Fe, New Mexico, shall at the time of its making of the levy of taxes for other purposes levy a special tax in the sum of ten mills on each dollar of taxable property within said limits of Santa Fe County; and further that by said writ it be ordered and directed that such moneys when collected shall be paid over out of the treasury of said Santa Fe County to relators, their legal representatives or assigns, upon the delivery of proper voucher or vouchers therefor, and that the money so paid shall be first applied to the payment of interest and costs of said judgment and then to the principal thereof, and further that judgment may be rendered in this action in favor of relators for the costs herein.

CHAS. A. SPIESS AND
S. B. DAVIS, JR.,
Attorneys for Relators. Las Vegas, N. M.

TERRITORY OF NEW MEXICO,
County of Santa Fe.

Stephen B. Davis, Jr., being duly sworn on oath deposes and says; that he had read the foregoing petition and know the contents thereof, and the same is true of his own knowledge, except as to the matters and things therein stated upon information and belief and as to such matters and things he believes the same to be true; that he is one of the attorneys for the foregoing relators and peti-
6 tioners, and that he makes this verification for the reason that said relators and petitioners are not within the Territory of New Mexico, but reside in the State of New York.

STEPHEN B. DAVIS, JR.

Subscribed and sworn to before me this 22nd., day of August, A. D. 1905.

[SEAL.]

W. A. BARNEY,
Notary Public, Santa Fe County, New Mexico.

(Record H, Page 400.)

EXHIBIT "A."

In the District Court, First Judicial District, Territory of New Mexico, County of Santa Fe.

No. 4092, Civil.

BIRD S. COLER and ELVERTON T. CHAPMAN, Plaintiffs,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE, Defendants.

Now on this 24th day of September A. D. 1900, this cause having been called for trial, on the issues joined herein, the parties announce themselves ready for trial, N. B. Laughlin Esqr., and Charles Waterman Esqr., appearing for the plaintiffs, R. C. Gortner, Esqr., district attorney for the First Judicial District of the Territory of New Mexico appearing for the defendant, and the parties having heretofore in open court waived of record, a trial by jury, submitted their cause of action, of law as of fact, to the Court, and the court having heard the same, and the evidence offered by both the plaintiff and the defendant, and now being fully advised in the premises, doth find all of the issues joined therein in favor of the plaintiff and against the defendant, and the law and facts are with the plaintiff, and the court does hereby assess the plain-
7 tiffs damages in the sum of Sixty Thousand Nine Hundred and Twenty Six Dollars and two cents, for which amount plaintiffs are entitled to a judgment against the defendant.

Wherefore, in accordance with the findings of the court herein: It is considered, ordered and adjudged by the Court, that the said Plaintiffs, Bird S. Coler, and Elverton R. Chapman, do have and recover of and from the said defendant, The Board of County Commissioners of the County of Santa Fe, the sum of sixty thousand nine hundred and twenty six dollars and two cents, the sum of their damages assessed as aforesaid, with interest thereon from this date, at the rate of five per centum per annum until this judgment shall be paid together with the costs in this behalf laid out and expended, to be taxed.

And it is further ordered and adjudged that the defendant, The Board of County Commissioners of Santa Fe County does forthwith cause the said sixty thousand nine hundred and twenty six dollars and two cents, and the interest thereon due, and to grow due thereon, at the rate of five per centum per annum from this date, and costs, to be assessed and levied upon and out of the taxable property situate in the said County of Santa Fe, and to cause the same to be collected in the manner provided by law, and to be paid out of the treasury of said county to the said plaintiffs their legal representatives or assigns, upon the delivery of proper voucher or vouchers therefor. And it is so ordered. And it is further ordered that no costs herein be taxed against plaintiffs.

which said petition is endorsed as follows, to-wit:

No. 4746, District Court Santa Fe County. The territory of New Mexico at the relation of Bird S. Coler and Elverton T. Chapman, Petitioners, *vs.* The Board of County Commissioners of
8 the County of Santa Fe, and the members thereof, to-wit: Arthur Seligman, A. L. Kendall and Jose Inez Roival, Respondents. Mandamus. Petition. Filed in my office August 22, 1905. A. M. Bergere, Clerk. Chas. A. Spiess, S. B. Davis, Jr., Las Vegas, Att'ys for Relators.

And thereafter, and on to-wit, the 30th day of August, A. D. 1905, there was issued out of the office of the Clerk of this Court a peremptory writ of madamus, which said peremptory writ of mandamus is in words and figures as follows to-wit:

In the District Court for the First Judicial District, Territory of New Mexico, County of Santa Fe.

No. 4746.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE and the Members Thereof, to wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROIBAL, Respondents.

Mandamus.

Whereas, on the twenty-second day of August, A. D. 1905, there was duly filed and presented to the District Court of Santa Fe County, New Mexico, a petition in the above entitled cause, praying for a peremptory writ of mandamus, which petition is in words and figures as follows, to-wit:

9 In the District Court for the First Judicial District, Territory of New Mexico, County of Santa Fe.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE and the members *to* Thereof, to wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROIVAL, Respondents.

To the Honorable John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the First Judicial District Court thereof:

Come now the above named petitioners and relators by their attorneys Charles A. Spiess and S. B. Davis Jr., and respectfully inform this Court as follows:

(1st) That on to-wit the 24th. day of September, A. D. 1900, Your relators recovered judgment in this Court against the respondents the Board of County Commissioners of the County of Santa Fe, in the sum of Sixty Thousand Nine Hundred and Twenty Six, and .02-100 Dollars, for and on account of coupons then past due from certain bonds, thereafter issued by the County of Santa Fe, in the Territory of New Mexico, said judgment being rendered in that certain cause Numbered 4092 on the civil docket of Santa Fe, New Mexico, entitled Bird S. Coler, and Elverton T. Chapman, plaintiffs, *vs.* The Board of County Commissioners of the County of Santa Fe, defendant, which said judgment is recorded in book H, Page 400 of the records of said court, a copy of which said judgment is hereto attached, hereby referred to and made a part hereof, being designated as Exhibit A.

(2nd) That by said judgment it was ordered, among other things that the defendant, the Board of County Commissioners of Santa Fe County New Mexico, should forthwith cause the said Sixty
10 Thousand Nine Hundred and Twenty Six and .02-100 Dollars and the interest thereon due and to become due, at the rate of five per centum per annum from this date, to be assessed and levied upon and out of the taxable property situate in the said County of Santa Fe, and to cause the same to be collected in the manner provided by law, and to pay the same out of the treasury of said county to the said plaintiff, their legal representatives, or assigns, upon the delivery of a proper voucher or vouchers thereof.

(3rd) That no part of said judgment, nor of the interest thereon has ever been paid, and as relators are informed and believe the respondent has wholly failed to collect any sum whatsoever from taxes or otherwise for the payment of said judgment, and relators are informed and believe that there is no money or funds whatsoever in the treasury of Santa Fe County, New Mexico, applicable to the payment of said judgment and that there is now due and unpaid on said judgment the sum of seventy-five thousand nine hundred and seventy-five and .72-100 dollars.

(4th) That the above named respondents Arthur Seligman, A. L. Kendall and Jose Inez Roibal, are the duly elected, qualified and acting County Commissioners of the said County of Santa Fe, and as such are charged with the duty under the laws of the Territory of New Mexico of making a levy of taxes and ordering the collection of the same for the purpose of paying said judgment and the interest and costs thereon according to the terms thereof.

(5th.) That relators are informed and believe that the said respondents acting as the Board of County Commissioners of said Santa Fe County, at a meeting held by them during the month of July or August A. D. 1905, made a levy of taxes upon the taxable property of said Santa Fe County, New Mexico, for the pur-
11 pose of raising funds for territorial, county, school and other purposes for the year 1905, but relators state the fact to be that the respondents have wholly failed and refuse and still fail and refuse to make any levy whatsoever, for the year 1905, for the purpose of raising funds to pay the aforesaid judgment and the interest and costs thereon.

(6th.) That relators, Bird S. Coler and Elverton T. Chapman, are beneficially interested in the said judgment, being the judgment creditors and the present holders of said judgment and that relators have no plain, speedy or adequate remedy in the ordinary course of law.

Wherefore, Your relators pray that a peremptory writ of mandamus in due form, be at once issued from this court, commanding and requiring the said respondents to convene at the Court House in Santa Fe, New Mexico, on or before Thursday the 31st day of August, A. D. 1905, in special session, as the Board of County Commissioners of Santa Fe County, New Mexico, and then and there make a special levy of taxes upon all the taxable property within the limits of the County of Santa Fe, Territory of New Mexico of ten mills on each dollar of such taxable property for the purpose of paying a portion of the judgment aforesaid, with the interest and costs thereon, and that on each and every year hereafter until said judgment, interest and costs be fully paid, the said Re-pondents, the Board of County Commissioners of Santa Fe County, New Mexico, shall at the time of its making of the levy of taxes for other purposes levy a special tax in the sum of Ten Mills on each dollar of taxable property within said limits of Santa Fe County; and further that by said writ it be ordered and directed that such moneys when collected shall be paid over out of the treasury of said Santa Fe County to
12 relators, their legal representative or assigns, upon the delivery of proper voucher or vouchers therefor; and that the money so paid shall be first applied to the payment of interest and costs of said judgment and then to the principal thereof, and further that judgment may be rendered in this action in favor of relators for the costs herein.

CHAS. A. SPIESS AND
S. B. DAVIS, JR.,
Attorneys for Relators, Las Vegas, N. M.

TERRITORY OF NEW MEXICO,
County of Santa Fe:

Stephen B. Davis, Jr., being duly sworn on oath deposes and says: that he had read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as — the matters and things therein stated upon information and belief and as to such matters and things he believes the same to be true; that he is one of the attorneys for the foregoing relators and petitioners, and that he makes this verification for the reason that said petitioners are not within the Territory *for* New Mexico, but reside in the State of New York.

STEPHEN B. DAVIS, JR.

Subscribed and sworn to before me this 22nd day of August, A. D. 1905.

[SEAL.] W. A. BARNEY,
Notary Public, Santa Fe County, New Mexico.

And the Court having read and considered the said petition and having heard the attorneys for relators, in support thereof, and it appearing to the Court that the right to require the performance of the acts set out in the prayer of said complaint, is clear, and it being apparent that no valid excuse can be given by respondents for
13 performing the said acts in accordance with the prayer of said petition, and the court being now sufficiently advised and informed in the premises:

It is further ordered, considered and adjudged, that a peremptory writ of mandamus issue out of this Court in accordance with the prayer of said petition:

Therefore, This is to command you, The Board of County Commissioners of Santa Fe County, New Mexico, and you the said Arthur Seligman, A. L. Kendall, and Jose Inez Roibal, members of said board convene at the Court house of said Santa Fe County, on or before Thursday, the 31st day of August, A. D. 1905, in special session, as the Board of County Commissioners of Santa Fe County, New Mexico, and then and there to make a special levy of taxes upon all the taxable property within the limits of the County of Santa Fe, and Territory of New Mexico, of ten mills, on each dollar of such taxable property for the purpose of paying a portion of the said judgment of relators with the interest and costs thereon; and further, to command you, that on each and every year hereafter, until the said judgment, interest, and costs be fully paid, you do, at the time of the making of the levy of taxes for other purposes in said county, levy a special tax in the sum of Ten Mills on each dollar of taxable property within said limits of Santa Fe County, for the said purpose; and further that such moneys, when collected, shall be paid over out of the treasury of Santa Fe County to relators, their legal representatives or assigns, upon the delivery of a proper voucher or vouchers therefor, and that the moneys so paid shall be first applied to the payment of interest on said judgment and the costs thereof, and then to the principal thereof; that on the 1st day of September, A. D. 1905, and on the 1st day of September of each succeeding year, until the same said judgment interest and costs shall have
14 been fully paid and satisfied, you make return of this writ, showing in what manner you have obeyed it.

And hereof fail not.

Witness the Honorable John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the First Judicial District thereof, and the seal of said District Court, this 22nd day of August, A. D. 1905.

[SEAL.] JOHN R. McFIE,
Associate Justice, etc.
A. M. BERGERE, *Clerk.*

It is ordered, That the foregoing peremptory writ of mandamus issue out of this court and that service thereof be made by serving upon the above named Arthur Seligman, A. L. Kendall, and Jose Inez Roibal, and delivering to each of them, a certified copy thereof.

Dated this 22nd day of August, 1905, at Santa Fe, New Mexico.

JOHN R. McFIE,
Associate Justice.

Endorsed: No. 4746, District Court Santa Fe County. Mandamus. The Territory of New Mexico, at the relation of Bird S. Coler and Elverton T. Chapman, petitioners and respondents, *vs.* The Board of County Commissioners of the County of Santa Fe, *et al.*, Respondents. Peremptory writ of mandamus. Filed in my office August 30, 1905. A. M. Bergere, Clerk.

And thereafter and on to wit, the said peremptory writ of
15 mandamus was on the 30th day of August, A. D. 1905, duly returned to the office of the Clerk of this Court endorsed in figures and words to-wit as follows to-wit:

TERRITORY OF NEW MEXICO,
County of Santa Fe:

I, Antonio J. Ortiz, sheriff of Santa Fe County, New Mexico, do hereby certify that I served the within writ upon the within named defendants, within my said county by delivering to each of them in person a true copy thereof duly certified by the Clerk of this Court upon the following dates: To Arthur Seligman, August 22, 1905. To A. L. Kendall, August 25th, 1905. To Jose Inez Roival, August the 23rd, 1905.

Witness my signature this 30th day of August A. D., 1905.

ANTONIO J. ORTIZ,
Sheriff Santa Fe County, New Mexico,
By JOSE L. LOPEZ,
His Deputy.

And thereafter, and on to-wit, the 23th day of August, A. D. 1905, there was filed in the office of the Clerk of the Court a petition, which said petition is in words and figures as follows to-wit:

In the District Court for the First Judicial District, Territory of New Mexico, County of Santa Fe.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE and the Members Thereof, to wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROIVAL, Respondents.

Comes now the respondents, the Board of County Commissioners of the County of Santa Fé, and the members thereof to wit:
16 Arthur Seligman, A. L. Kendall, and Jose Inez Roival and move and petition the court as follows:

I.

That on the 24th day of September, 1900, the date of rendition of the judgment in causes number 4091 and 4092 civil in the District Court of Santa Fe County Territory of New Mexico all of the prop-

erty subject to taxation within the County of Santa Fe as then existing was made subject to the payment of its pro rata of said judgments.

That the Thirty Fifth Legislative Assembly of the Territory of New Mexico eliminated a portion of Santa Fe County and attached the same to the County of Rio Arriba and that said eliminated portion of Santa Fe County was by said act of the legislative assembly held liable and subject to its portion of the indebtedness of Santa Fe County.

That the Thirty Fifth Legislative Assembly of the Territory of New Mexico eliminated another portion of the County of Santa Fe and included the same in the county then created and now known as the County of Torrance.

That all of the taxable property now lying and being in said portions of the Counties of Rio Arriba and Torrance is now liable and subject to its portion of said indebtedness included in the said judgments the same as the property situate and being within the present boundaries of the County of Santa Fe. The County Commissioners of the County of Santa Fe are without jurisdiction to assess and levy any taxes upon the property now included within the Counties of Rio Arriba and Torrance.

That the peremptory mandamus issued in the above entitled cause includes only the property and Territory within the present boundaries of the County of Santa Fe and does not pretend to in-
17 clude the property and Territory situate in the former portions of the County of Santa Fe and being now portions of the Counties of Rio Arriba and Torrance. That the calculation of the interest levy ordered in said peremptory writ is not therefore based upon the entire property and Territory subject to the payment of said judgments.

II.

Respondents further show to the court that a writ of mandamus was issued out of the District Court on the 25th day of January 1901 in the case of the Territory of New Mexico *ex rel.* Coler *et al. vs.* The Board of County Commissioners, requiring the respondents to levy a tax upon the taxable property situate in the said County of Santa Fe sufficient in amount to produce the sum of $135,284.19 with interest thereon from the 24th day of September A. D. 1900, until paid at the rate of five per cent. per annum together with the further sum of $30.00 costs, the said sum being for the amount of the judgment in cases number 4091 and 4092 of the District Court of Santa Fe County.

That upon the 7th day of February, 1901, the Board of County Commissioners of the County of Santa Fe, in obedience to the said writ of mandamus made a levy of eighty two mills on each dollar upon the taxable valuation of the property of the County of Santa Fe, and certified the same to the treasurer and *ex-officio* collector of the County of Santa Fe, and directing him, the said collector to place the said levy upon the tax rolls of said county and proceed immediately thereafter to collect the same in the manner provided by law, in obedience to and full compliance with the order contained in said

writ of mandamus and judgment in the said cause number
18 4091 and 4092 of the District Court of Santa Fe County, all of which is shown by the record of the Commissioners' proceedings, a certified copy of which is hereto attached and made a part hereof.

That the said levy of eighty two mills aforesaid is standing upon the tax rolls of the County of Santa Fe as a lien upon and against all of the property of the County of Santa Fe as then existing subject to the payment of the judgment aforesaid.

That the County Commissioners are without authority in law to enforce the collection of the said levy of eighty two mills.

That the said levy of eighty two mills is ample and sufficient to cover the amount of the judgment in cases number 4091 and 4092 aforesaid.

III.

That the levy of ten mills on each dollar of the taxable property of the County of Santa Fe for the purpose of paying of said judgment of relators with interest and costs thereon, and the same levy for each and every year thereafter until the said judgment, interest and costs be full paid is for the purpose of paying the same obligation as the eighty two mill levy aforesaid and is largely in excess of the amount required to pay the said judgment, interest and costs, and is therefore unjust and wrongful to the tax payers and property interests of the County of Santa Fe.

IV.

That the payment of the judgment rendered in case No. 4091 and 4092 by the levy of a tax of ten mills annually for each and every year until the said judgments are paid is unjust and unfair to the taxpayers of the County of Santa Fe and ruinous to the progress and prosperity of the entire county in this that a lien twice as large as necessary is placed upon the real estate and property of said
19 county and the taxpayers who pay taxes will be required year after year to pay the proportion of the said levy of those who refuse to pay the said ten mill levy.

V.

The respondents are entitled to be heard as to the amount of levy necessary and whether any levy should be ordered, there existing upon the tax rolls a legal and adequate levy to cover said judgment.

VI.

Respondents further allege that it is impossible to determine the amount of levy necessary to be made for the year succeeding the year of 1905, until the tax rolls for said year shall have been completed and the amount of taxable property determined. That the respondents should not be held in default of their official duties of making a levy for said years until the time arrives that the said levy can be made and they shall have failed to perform their duty as enjoined and required by law.

VII.

That the levy of the tax as directed and required in the peremptory writ is not an act which the law specially enjoins as a duty resulting from an office, trust and station, because the levy of eighty-two mills to pay the same judgment as ordered by the court in said cases number 4091 and 4092 was made by the respondents and is ample and sufficient to pay said judgments when collected. That it is not the duty of respondents to collect the aforesaid levy but the duty of the treasurer and *ex-officio* collector of Santa Fe County.

VIII.

That relators have a plain, speedy and adequate remedy in the ordinary course of law.

20 For a further and additional ground of motion, the respondents say:

(*a*) That the act of congress whereby the bonds in question are pretended to have been validated, approved and confirmed, is indefinite, uncertain and incapable of reasonable interpretation and inforcement so as to be applied to any bonds issued by the County of Santa Fe.

(*b*) That the said act of congress does not sufficiently identify any bonds of the said county so as to apprise the board of county commissioners of the said county of the bonds intended to be validated, approved and confirmed.

(*c*) That no bonds of the said county, in the amount of $172,500.00, dated March 1st, 1902, issued under the provisions of an act of the territorial general assembly, known as the refunding act, in refunding and in lieu of $150,000.00 of bonds and overdue interest thereon, of said County of Santa Fe, theretofore issued and outstanding, were ever issued by the said County of Santa Fe, but bearing said date, issued under the provisions of an act of the Territorial General Assembly, known as the refunding act, in refunding and in lieu of one hundred and fifty thousand dollars of bonds, and the overdue interest thereon, issued and outstanding, were issued bonds of the said county in an amount far in excess of the said sum of $172,500.00, and it can not be understood from the said act whether all of such issues have been validated by the said act of congress, or whether only an amount thereof not exceeding, $172,500.00 and if no more than $172,500.00 in amount, which of said bonds are validated.

(*d*) That the said bonds so pretended to have been validated are the subjects of different ownership and are not all in the hands of any one person, but in the hands of divers persons, and it cannot be determined from the said act of congress what holder of said
21 bonds in excess of the amount named in the said act of congress shall not have the benefits of validation.

(*e*) That the total amount of bonds issued by the said County of Santa Fe, issued as aforesaid in excess of $172,500.00 is not less than $200,000.00, under the said refunding act.

(*f*) That at the time of the passage of the said act of congress and its becoming a law by limitation, there was more than one called and known as "refunding act" in force in the Territory of New Mexico, by enactment of its Legislative Assembly, but what refunding act is referred to by the said act of congress is not disclosed.

Wherefore respondents pray that the peremptory order be suspended herein and that they be permitted to show cause and be heard before the said order and writ is made permanent.

THE BOARD OF COUNTY COMMISSIONERS
OF SANTA FE COUNTY,
By E. C. ABBOTT,
District Attorney.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

Arthur Seligman, being first duly sworn upon his oath says he is chairman of the Board of County Commissioners and respondent herein, that he has read the foregoing petition and knows the contents thereof and that the allegations thereof are true except those stated upon information and belief and as to those he believes them to be true.

ARTHUR SELIGMAN,
Chairman B. of C. Com.

Subscribed and sworn to before me this 26th day of August 1905.

A. M. BERGERE,
Clerk of Court.

TERRITORY OF NEW MEXICO,
County of Santa Fe:

I, Marcos Castillo, Probate Clerk and Ex-Officio Recorder
22 of Santa Fe County, duly certify, that this is a true copy of the proceedings of county commissioners of Santa Fe county held on the 18th. day of January, 1901.

N. B. Laughlin Esqr., appeared before the board on behalf of Bird S. Coler and Elverton R. Chapman and demanded tax levy and made a verbal and written demand to immediately make a levy on all the taxable property situate in said County of Santa Fe, and certify such levy to the collector of taxes of your county and direct him to place the same on his tax rolls in his office and to proceed immediately to collect the same in a sufficient sum to pay judgments recovered by said Coler and Chapman against the Board of County Commissioners of Santa Fe, in the District Court of the County of Santa Fe, in cases numbered 4091, and 4092, in the said court, in the aggregate sum of One Hundred and Eighty Four Dollars and Nineteen cents, with interest thereon at five per centum per-annum from September 24th, 1900 until paid, with the costs accrued thereon in the sum of Thirty Five Dollars.

The matter was referred to the district attorney for his opinion thereon.

Summons in case No. 4238, First Judicial District Court, County of Santa Fe, George M. Black *vs.* The Board of County Commission-

ers of the County of Santa Fe, was received by the board and same was ordered referred to the district attorney for opinion on the same. The board of county commissioners then took adjournment subject to the call of the chairman.

W. H. KENNEDY,
Chairman.

MANUEL DELGADO, *Clerk.*

23 Writ of Peremptory Mandamus.

SANTA FE, N. M., *February 7th,* 1901.

The Board of County Commissioners met pursuant to Writ of Peremptory Mandamus issued out of the District Court.

Present W. H. Kennedy, Jose A. Lujan, Arthur Seligman Commissioners and Manuel Delgado, Clerk.

N. B. Laughlin appeared for the plaintiffs, and Mr. R. C. Gortner for the County Commissioners defendants, after having considered the said writ of mandamus, the following was adopted:

TERRITORY OF NEW MEXICO,
County of Santa Fe:

On this February the 7th, 1901, the Board of County Commissioners being assembled in pursuance of the writ of the peremptory mandamus issued out of the District Court in and for the County of Santa Fe, on January 25th, 1901, in the matter of the Territory of New Mexico, *ex rel.* Coler *et al. vs.* Board of County Commissioners Etc., and having considered, the writ of mandamus, and endeavored to ascertain how large a tax levy upon, and out of all the taxable property situate in said County of Santa Fe, will be sufficient in amount to produce the sum of $135,284.19 with interest thereon from the 24th, day of September A. D. 1900 until paid at the rate of five per-centum per-annum together with the further sum of thirty dollars and costs and being unable to calculate how much will be the amount of said interest, until paid as aforesaid but having considered the matter does hereby make, and order and direct a levy upon every dollar of taxable property existing this day in said County of Santa Fe, to the amount of eight and one fifth cents thereon for the purpose aforesaid and said board does hereby certify the said levy to the collector of taxes of the said County of
24 Santa Fe, and does direct him the said collector to place the said levy upon the tax rolls of said county and to proceed immediately thereafter to collect the same in the manner provided by law in such cases made and provided and does direct its clerk to serve a copy hereon on the said collector.

W. H. KENNEDY,
ARTHUR SELIGMAN,
JOSE A. LUJAN,
Board of County Commissioners, Santa Fe County.

Attest:
MANUEL DELGADO.

W. H. KENNEDY,
Chairman.

In witness whereof I set my hand and affixed my official seal this 24th day of August, A. D. 1905.

MARCOS CASTILLO,
[SEAL.] *Probate Clerk and ex-Officio Recorder of Santa Fe County, New Mexico.*

Which petition is endorsed as follows to-wit:

District Court of Santa Fe County. The Territory of New Mexico, *ex el.* Coler *vs.* The Board of County Commissioners of Santa Fe County. Petition. Filed in my office August 26, 1905. A. M. Bergere, Clerk. E. C. Abbott, District Attorney.

And thereafter and on to-wit, the 31st of October, A. D. 1905, there was filed in the office of the Clerk of this Court an order overruling motion and petition of Respondents, which said motion is in words and figures as follows to-wit:

25 In the District Court of the First Judicial District, Territory of New Mexico, County of Santa Fe.

No. 4747.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY and the Members Thereof, to wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROYBAL, Respondents.

Order.

This cause coming on to be heard this 29th day of August upon the petition and motion of respondents praying for the suspensions of the peremptory writ until after a hearing, the respondents being represented by E. C. Abbot, District Attorney, and the relators being heard by Stephen B. Davis, Jr., Esqr., and the court having heard the motion and petition, and being fully advised in the premises.

It is therefore considered, ordered, and adjudged, by the court that the said motion and petition be and the same is hereby overruled, to which order the respondents duly except.

JOHN R. McFIE,
Judge, etc.

Endorsed: No. 4746, District Court of Santa Fe County. Territory of New Mexico *ex-rel.* Bird S. Coler *et al. vs.* The Board of County Commissioners Santa Fe County etc. Order overruling motion and petition of Respondents. Filed in my office Aug. 31st, 1905. A. M. Bergere, Clerk. E. C. Abbott, District Att'y. A. B. Renehan, Att'ys for Defendants.

26 And thereafter, and on to-wit, the 31st day of Aug. A. D. 1905, there was filed in the office of the Clerk of this Court an Order allowing an appeal, which said Order is in words and figures as follows to-wit:

In the District Court of the First Judicial District of the Territory of New Mexico, Sitting within and for the County of Santa Fe.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE and the Members Thereof, to wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROIVAL, Respondents.

Order Allowing Appeal.

Now on this 31st day of August, 1905, this said cause coming on to be heard on the motion of the respondents heretofore filed herein for the allowance of an appeal to the Supreme Court of the Territory of New Mexico; the relators being represented by S. B. Davis, Jr., Esq., and the respondents being represented by E. C. Abbott, District Attorney, and A. B. Renehan, Esq., and the court having heard the arguments of counsel and being now fully advised in the premises finds, that the said respondents are entitled to an appeal to the Supreme Court of the Territory of New Mexico, and that said appeal shall operate as a supersedeas to stay the execution of judgment requiring the respondents to make a levy as required by said judgment in said cause and that no bond be required of respondents, the judgment being against the County of Santa Fe.

It is therefore ordered, considered and adjudged by the court that an appeal be and the same is hereby granted from the judg-
27 ment of this Court herein to the Supreme Court of the Territory of New Mexico, by the respondents herein and that said appeal shall operate as a supersedeas to stay the execution of the said judgment requiring a levy by the respondents as specified in the said judgment and that no supersedeas bond be required herein.

JOHN R. McFIE,
Judge, etc.

Endorsed: No. 4746. District Court Santa Fe County. Territory of New Mexico *ex-rel.* Coler *et-al. vs.* Board of County Commissioners, Santa Fe County. Order allowing appeal. Filed in my office August 31st, 1905. A. M. Bergere, Clerk. E. C. Abbott, District Attorney, A. B. Renehan, Att'ys for Defendant.

And thereafter, and on to-wit, the 5th day of October, A. D. 1905, there was filed in the office of the clerk of this Court a Præcipe, which said præcipe is in words and figures to-wit:

In the District Court in the Territory of New Mexico within and for the County of Santa Fe.

No. 4746.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS and the Members Thereof, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROYBAL, Respondents.

To the Hon. Clerk of the District Court of the First Judicial District:

Please prepare a transcript of the record in the above en-
28 titled cause, of three copies, and including the following papers towit:

No. 1, Petition of Petitioners.
No. 2, Peremptory writ of Mandamus.
No. 3, Petition and motion of Respondents.
No. 4, Order overruling motion and petition of respondents.
No. 5, Order allowing appeal.

E. C. ABBOTT,
District Attorney.

Endorsed: No. 4746, Territory of New Mexico at the relation of Bird S. Coler and Elverton T. Chapman, Petitioners, *vs.* The Board of County Commissioners, and the members thereof to wit: Arthur Seligman, A. L. Kendall, and Jose Inez Roibal, Respondents. Praecipe. Filed in my office Oct. 5, 1905. A. M. Bergere, Clerk. E. C. Abbott, District Attorney for Defendant.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

I, A. M. Bergere, Clerk of the District Court of the First Judicial District, of the Territory of New Mexico and of the District Court of the County of Santa Fe, within said Territory, do hereby certify that the foregoing twenty four (24), pages contain a full, true, and complete transcript of the record and proceedings had in a cause lately pending in said court, wherein the Territory of New Mexico, at the relation of Bird S. Coler, and Elverton T. Chapman, were petitioners, and the Board of County Commissioners of the County of Santa Fe, and the members thereof to-wit: Arthur Seligman,
29 A. L. Kendall, and Jose Inez Roibal, were respondents, as the same now appears of record in my office.

In witness whereof, I have hereunto set my hand,, and the seal of said Court, at my office in the City of Santa Fe, in the County and Territory aforesaid, this 20th day of October, A. D. 1905.

A. M. BERGERE,
Clerk of said Court.

30 And afterwards, on to wit, *on* the 28th day of November A. D., 1905, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of error in the above entitled cause, which said assignment of error was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1905.

No. 1122.

THE TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL., Appellees,

vs.

BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY, Appellant.

Appeal from District Court, Santa Fe County.

Assignment of Errors.

Now come the respondents and appellants by E. C. Abbott, District Attorney for the Counties of Santa Fe and Taos, and A. B. Renehan, Esq., their attorneys, and assign the following as errors committed by the court below in the trial of this cause to wit:

1. That the judgment, allowance and issuance of the peremptory writ of mandamus herein was authorized in law;

2. That the court erred in issuing a peremptory mandamus in the first place without a hearing or opportunity for hearing given to the respondents;

3. That the court erred in denying the motion of the respondents to suspend the peremptory order herein and to permit them to show cause and to be heard before the said order and writ should be made permanent, because the grounds of the said motion and
31 each of them, constituted a lawful and meritorious defense to the said proceeding, to the petition and to the writ issued;

4. That the court erred in holding that the bonds in question were legal and enforcible;

5. That the court erred by holding in effect that the act of alleged validation of the said bonds was intelligible, operative and enforcible;

6. That the court erred in denying the said motion for a hearing because the respondents had in law a right to require that the Counties of Rio Arriba and Torrance should be proceeded against in the same action;

7. That the court erred in denying the said motion of the respondents for a hearing, because they had a right in law to be heard in respect to the existing levy of February 7, 1901, for the same purpose as that sought in this proceeding, which constituted, if valid, a lien upon all the property within the said County of Santa Fe and upon which the levy sought in this proceedings would be cumulative without right in law, and without the elimination of the prior levy;

8. That the court erred in denying the motion of the respondents for a hearing, because they were entitled to be heard at least as to the amount of the levy which the court would make in said proceeding, if any, the same resting upon matter of fact essential to be proven.

9. That the court erred in so framing the said writ of mandamus as to cover successive years because the amount of levy, if any, which might be required in one year rather than another would depend upon circumstances and the valuation of property as it might be found by the assessing boards, and because the court in effect anticipated a refusal on the part of the respondents in subsequent years to make a levy for the matters in question in this proceeding, without any authority in law or fact for such anticipation, and
32 without any authority in law to extend the levy beyond the current fiscal year.

10. The court erred in denying the motion of the respondents for a hearing because of the grounds thereof set up in the eighth paragraph of said motion, taken jointly and severally, the same constituting meritorious and substantial defenses to the cause of action set up by the petitioners;

11. The court erred in the issuance of the said mandamus so as to cover future years, in this, that it assumes that the personnel of the Board of County Commissioners of the said County would continue uncha-ged, and on that assumption directs the incumbents at the time of the issuance of the said mandate to do that which they may not be in position to do, as members of the said Board, by reason of lapse of time and the expiration of term of office;

12. The court erred in many other matters and things apparent on the face of the record.

Wherefore the respondents and appellants pray that the said cause may be reversed, remanded or dismissed, as may be proper.

E. C. ABBOTT,
District Attorney for the Counties of Santa Fe and Taos.
A. B. RENEHAN,
Attorney for Respondents.

And afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government on the first Wednesday after the first Wednesday in January, A. D., 1906, on the seventeenth day of the said regular term, the same being Friday, January 26th A. D., 1906, the following among other proceedings were had and entered of record, to wit:

33 No. 1122.

TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL., Appellees,
vs.
BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL., Appellants.

Appeal from District Court, Santa Fe County.

It is ordered by the court that this cause, be and the same hereby is set for hearing for the 29th day of January, A. D., 1906.

And afterwards, on to-wit, *on* the nineteenth day of the said Regular term, the same being Monday, January 29th A. D., 1906, the following among other proceedings were had and entered of record, following to wit:

No. 1122.

TERRITORY OF NEW MEXICO *ex Rel.* BIARD S. COLER ET AL.,
Appellees,
vs.
BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL.,
Appellants.

Appeal from District Court, Santa Fe County.

This cause having come on to be heard upon the transcript of record, assignment of errors and briefs of counsel, is partly argued by A. B. Renehan, Esq. for appellants and C. A. Spiess, Esq., for appellees, and the argument not being concluded this cause is continued until tomorrow morning at ten o'clock.

A*b*d afterwards, on to wit: *on* the twentieth day of the said Regular term, the same being Tuesday, the 30th day of January, A. D., 1906, the following among other proceedings were had and entered of record, following to wit:

34 No. 1122.

TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL., Appellees,
vs.
BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL.,
Appellants.

Appeal from District Court, Santa Fe County.

This cause again coming on to be heard, upon the transcript of record, assignment of errors and briefs of counsel, is further argued by E. C. Abbott, Esq. for appellants, and submitted to the Court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January, A. D., 1907, on the twelfth day of the said Regular term, the same being Wednesday the 27th day of February A. D., 1907, the following among other proceedings were had and entered of record, to wit:

No. 1122.

TERRITORY OF NEW MEXICO *ex Rel.* BIARD S. COLER ET AL.,
Appellees,
vs.
THE BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL.,
Appellants.

Appeal from District Court, Santa Fe County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court, upon a former day of the present term, and the court being now sufficiently advised in the premises announces, its decision by Associate Justice Parker, Chief Justice Mills, and Associate Justices Mann and Abbott, concurring, modifying the judgment of the court below and as so modified, affirming the same for reasons stated in the opinion of the Court on file; It is therefore considered and adjudged that the judgment of the District Court in and for the County of Santa Fe, whence this cause came into this court, be so modified as to sustain the peremptory writ for the levy of a ten mills for each year until the interest accruing on the said judgments since the rendition of the said judgment on September 24 1900, is paid, and that as so modified, the judgment of the District Court in and for the County of Santa Fe, whence this cause came into this court is hereby affirmed.

And afterwards, on to wit: *on* the eighth day of March, A. D., 1907, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for a rehearing in the above entitled cause, which said motion for a rehearing was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

No. 1122.

THE TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL., Appellees,

vs.

THE BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL., Appellants.

Appeal from District Court, Santa Fe County.

Motion for Re-hearing.

Now comes the appellants and move the court for a rehearing of said cause, for the reason that questions decisive thereof in favor of the appellants, and duly submitted by counsel have been overlooked by the court as follows, to wit:

1. That the prayer for mandamus in this matter and the writ thereupon issued is for the payment of principal, interest and
36 costs, and therefore cover the same ground as the writ under which the 82 Mill levy was made, so that the court in its opinion herein departs entirely from the nature of the judgment below and attempts to substitute in lieu thereof an original judgment of its own, in mandamus.

2. That the petition upon which this writ was allowed in the lower court did not state facts sufficient to state a cause of action in that it failed to allege demand and failed to allege the value of taxable property in the County of Santa Fe upon which to authorize the trial court to determine a levy of any fixed amount as it sought to do.

3. That the relators had a plain, speedy and adequate remedy at law under the statute which pretended to authorize the bonds and coupons fundamental to this cause.

4. That the motion for a right to be heard should not be construed with the technical accuracy which would be proper if it were a return to an alternative writ, but was based upon the law that where a contest was probable or justifiable a peremptory writ should not issue in the first instance.

5. That under the force of the pretended mandamus of January 25th, 1901, which required the appellants to levy a tax sufficient in amount to produce the sum of $135284.19, with interest thereon from September 24th, 1900, until paid, on February 7th, 1901, the appellants in obedience thereto made a levy of 82 mills on each dollar of the taxable valuation of the property in the County of Santa Fe, in full compliance with the command of the said writ of mandamus.

6. That the failure of the collector to collect the said levies, if in fact he did fail, is to be attributed to the officer and not to the appellants.

7. That if the said sum of $135284.19, saying nothing of interest from September 24th, 1900, was based upon the assessed values of said county, by a matter of calculation it would appear that
37 those assessed values at the time of the said levies were 165000.00, but there is an entire absence of means to infer what were the assessed values, as there is no datum from which to infer the amount of interest included in the purposes of the said levies, although it might be assumed that some interest was involved.

8. That if the assessed values be taken as 165000, then a twenty mill levy or two ten mill levies thereon, would produce, $33000.00, instead of $32996.00.

9. That if it be assumed that the said 82-mill levy would produce only the face of the said judgments, which assumption is unwarranted by any facts or record, without any incorporation of interest then the court assumes that the record of the county commissioners and the statements in their motion for leave to answer are untrue, but these are questions of fact to be determined on return or answer, for the record shows that the 82-mill levy is full in compliance with the mandate of the lower court, and that it was made for the purposes of the mandate, which required the levy to be made for the payment of the basic judgment, with interest thereon at 5% from September 24, 1900, until paid, which mandate was obeyed as appears by the order of the appellants found at page 21, of the record in Appeal No. 1122.

10. That the amount of levy required to pay any balance due even on the theory of modification on which the Supreme Court proceeds is not a matter of mathematica or calculation on account of the confusion between the several mandates and the lack of certain factors or rather of certainty of the factors.

11. That there is no pleading, evidence or record, to authorize the modification proposed by this court, but the said modification is necessarily based upon speculative rather than substantial inferences and so of the theory than the court can apply the mandate to the production of money with which to pay interest since the former mandamus, since that was not the contemplation of the rela-
38 tors seeking a levy in place of the 82-mill levy on the assumption that it had not been paid, and the respondents seeking to defend on the ground that such levy would be cumulative without authority of law.

12. That the writ here in question was for the production of funds with which to pay said judgment and the interest accrued thereon not from September 24th, 1900, for that was covered by the levy of 82 mills of date of February 7th, 1901, so that if the court, is right in transmitting the case made below, the interest to which the modification could apply could be only that which accrued between February 7th, 1901, and August 31st, 1905, the date to which the levy in question here should be referred, which in no event would be 32996 but could be only $30958.43.

13. That there is no question of interest, paid or unpaid, since August 31st, 1905, or to be more accurate, since the date of the filing of the petition herein.

A. B. RENEHAN,
Attorney for Appellants.

And Afterwards, on to wit *on* the Seventeenth day of the Said Regular term, the same being Friday the 30th day of August, A. D., 1907, the following among other proceedings were had and entered of record, following to wit:

No. 1122.

TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL.,
Appellees,
vs.
THE BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL.,
Appellants.

Appeal from District Court, Santa Fe County.

This cause coming on before the court upon a motion of appellant herein for a rehearing, and the court being sufficiently advised in the premises, denies the same; It is therefore considered and adjudged by the court that the motion of appellant herein for a rehearing be and the same hereby is denied.

39

And Afterwards, on to wit, on the 25th day of October, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a motion and order of appeal in a the above entitled cause, which said motion for appeal and order allowing the same was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

No. 1122.

THE TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL.,
Appellees,
vs.
THE BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY, ET AL.,
Appellants.

Appeal from District Court, Santa Fe County.

Now comes the appellants herein, by A. B. Renehan, Esq. Special attorney for appellants, and R. C. Gortner District Attorney, and pray an appeal to the Supreme Court of the United States of America, from the order and judgment made and entered of record in the

above entitled cause, on to-wit, The 27th day of February A. D., 1907.

A. B. RENEHAN,
Special Attorney for Appellants.
R. C. GORTNER,
District Attorney.

This cause coming on to be heard upon the motion of appellants in the above entitled cause by their attorney A. B. Renehan, Esq. for an appeal of this cause to the Supreme Court of the United States of America, from an order and decision of this court, made
40 and entered of record on the 27th day of February A. D. 1907, It is hereby ordered by the court that the said motion of appellants, be and the same hereby is granted and allowed.

WILLIAM J. MILLS,
Chief Justice Supreme Court of the Territory of New Mexico.

October 24th, 1907.

And afterwards, on to wit, in Vacation on the 25th day of October A. D., 1907, there was entered of record the following order allowing an appeal in the above entitled cause which said order allowing an appeal was and is in words and figures following to wit:

No. 1122.

TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL., Appellees,
vs.
THE BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY, ET AL., Appellants.

Appeal from District Court, Santa Fe County.

This cause coming on to be heard upon the motion of appellants in the above entitled cause by their attorney A. B. Renehan, Esq., for an appeal of this cause to the Supreme Court of the United States of America, from an order and decision of this court, made and entered of record on the 27th day of February A. D., 1907. It is hereby ordered by the court that the said motion of appellants, be and the same is hereby granted and allowed.

WILLIAM J. MILLS,
Chief Justice Supreme Court, Territory of New Mexico.

October 24th, 1907.

And afterwards, on to-wit on the 27th day of February A. D., 1907, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an opinion by the *the* court
41 in the above entitled cause, which said opinion by the court was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

No. 1122.

TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER and E. T. CHAPMAN, Petitioners, Appellees,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE, Respondents, Appellant.

Appeal from District Court, Santa Fe County.

Opinion of the Court.

PARKER, *J.*:

On September 24, A. D., 1900, relators recovered judgment against appellant in two separate actions upon interest coupons past due and unpaid upon certain outstanding bonds of appellant and in the sum of $60,926.02 and $74,358.17, respectively. In and by said judgments it was ordered by the Court that the appellant levy upon all of the taxable property in said county a special tax sufficient to raise the amount of said judgments, together with interest thereon until paid, and together with costs. On February 7, 1901, the appellant levied on all the taxable property of the county a special tax for the payment of said judgments, interest and costs at the rate of eighty-two mills on the dollar and determined that this rate of levy was necessary to produce the aggregate amount of such judgments, interest and costs. Appellant has paid no portion of said judgments. On August 22nd, 1905, a petition for a peremptory writ of mandamus was filed in the Court below by appellees to compel appellant to levy a special tax of ten mills upon each dollar's — of all taxable property in the county to be applied to the payment of each of said judgments. The Court without hearing awarded a peremp-
42 tory mandamus as prayed. Thereafter appellant on August 26, 1905, filed in said causes a petition alleging; that at the date of the rendition of said judgments, on September 24, 1900, all of the property subject to taxation within the then county of Santa Fe was subject to the payment of its pro-rata of said judgments; that the Thirty-fifth Legislative Assembly of New Mexico segregated a portion of Santa Fe County and attached same to the County of Rio Arriba and another portion of said County and attached the same to the County of Torrance; that all of said portions so segregated were still liable and subject to their proportion of said indebtedness; that said peremptory mandamus included only the property within the present boundaries of Santa Fe County and not the portions theretofore segregated; reciting the former mandatory order of the Court upon appellant and the compliance therewith; that said former levy was still existing and a lien upon taxable property of the county; that said former levy was ample and sufficient to cover the amount of said judgments; that said two ten mills

levies were for the payment of the same obligation as the said former eighty-two mills levy and was largely in excess of the amount required to pay the said judgments, interest and costs; that appellant was entitled to be heard as to the amount of levy necessary and whether any levy was necessary; that said former levy of eighty-two mills was sufficient to pay said judgments.

Appellant further alleged that the act of Congress whereby the bonds, the coupons whereof were the subject of the said actions, were validated is indefinite, uncertain and incapable of a reasonable interpretation and enforcement so as to be applied to any bonds issued by the County of Santa Fe, and does not sufficiently identify any bonds of said county intended to be validated. Appellant prayed that the peremptory mandamus in said action be suspended and that appellant be permitted to show cause and to be heard before said order and writ be made permanent. The petition was denied and appellant brings the cause here for review.

43 It is conceded by appellees that if the former levy of eighty-two mills is sufficient to pay the said judgments, interest and costs, that the present writs were improvidently issued. But it is contended that the record in this case itself shows, notwithstanding the allegations of the appellant, that such is not the fact. It is to be observed that the appellant in its former levy of eighty-two mills on the dollar determined that this was simply sufficient to pay the then amount of the judgments, together with the interest until paid, and costs. No attempt was made at that time to make a levy to pay any greater sum than the amount then due. The resolution of the Board of County Commissioners shows upon its face this fact. Since that time the judgments have born- interest and at the date of the issuance of the peremptory writs in this cause they had amounted to the sum of $32,874.05, in excess of the amount then due. The claim, therefore, of appellant that the eighty-two mills levy was sufficient to pay the amount of the judgments at the date of the issuance of the peremptory writs is unfounded and untrue in fact.

The allegation, however, that the two ten mills are excessive is based upon the different proposition. The amount of interest accumulated upon the said judgments since the date of the former eighty-two mills levy is the sum of $32874.05. If the two ten mills levies will produce more money than is required to pay this sum then they ought not to have been commanded by the writs. But it nowhere appears in the record that any increase had been made in the assessed valuation of the property of Santa Fe County and, on the other hand, it is alleged by appellant that portions of the county have been cut off by the legislature since the levy of the eighty-two mills. It is fair to presume, therefore, in the absence of any showing to the contrary, that the assessed valuation of the county is not in excess of what it was in 1901, when the eighty-two mills levy was made. If this is so, a twenty mills levy will produce, if collected in full, $32,996., an excess only of $121195 over and above the

44 amount required to pay the interest on the judgments accumulated since the date of their rendition, and up to the date of the issuance of the peremptory writs in this case. Nearly $10,-

000.00 in interest has accrued on the said judgments since that time. It, therefore, appears that the levy of the twenty mills commanded by the writs in this case is not excessive, the allegations of appellants to the contrary, notwithstanding.

It is urged that the peremptory writs demand a continuing levy of twenty mills from year to year until the entire judgments, principal, interest and costs are paid, and that the court consequently exceeded its authority. This position we are inclined to think correct but the judgment below will in this particular be modified so as to avoid the objection.

It is urged that the action of the Court is erroneous for the reason that the two precincts mentioned as having been segregated from the County of Santa Fe and attached to other counties should have been included in the peremptory writs and tax levy. This contention has no merit. By Chapter 20 of the Session Laws of 1903, it is provided that any portion of a county, owing a bonded debt which shall be segregated, shall not be released from its obligation to contribute its just proportion to the payment of such debt. But it is provided therein the assessment, levy and collection of such proportion shall be upon the order of the old county by the officers of the new county and that the money collected shall be paid into the treasury of the old county. The County of Santa Fe, therefore, has it within its power to compel contribution from the two other counties, which have received a portion of its territory, in proportion to the amount of taxable property received, and this is the method provided by law.

It is further urged that the Act of Congress validating the bonds in question is so indefinite and uncertain as that the question of their validity is open and that the same may be inquired into in this proceeding. This proposition is palpably untenable. The pro-
45 cess of mandamus is simply in aid of the judgments and is in the nature of an execution for the enforcement thereof. Any attack upon the judgment in this proceeding would be a collateral attack which is not allowable, the only remedy being by direct attack by way of appeal, and this right had been lost by lapse of time. The only error of the court below is in awarding a continuing mandamus for the payment of the entire amount of the judgments, interest and costs, and in this respect the same will be modified so as to sustain the peremptory writs for the levy of the two ten mills levies for each year until the interest accruing on the said judgments since the rendition of the judgments on September 24th, 1900, is paid, and, as so modified, the judgments of the court below will be affirmed, and it is so ordered.

FRANK W. PARKER,
Associate Justice.

We concur:
WILLIAM J. MILLS, *C. J.*
EDWARD A. MANN, *A. J.*
IRA A. ABBOTT, *A. J.*

Associate Justice McFie, having tried the case below, did not participate in this decision.

Associate Justice Pope did not participate in this decision.

46 TERRITORY OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the foregoing fourty five pages contain a full true and perfect copy of the record and proceedings, pleadings and opinion filed in a certain cause lately pending in the Supreme Court of the Territory of New Mexico—entitled The Territory of New Mexico, Bird S. Coler *et al.* appellees *vs.* The Board of County Commissioners of Santa Fe County, Appellants which is hereby transmitted to the Supreme Court of the United States in accordance with an appeal herein taken October 24th A. D. 1907.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 26th day of October, A. D. 1907.

[Seal Supreme Court Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

47 THE UNITED STATES OF AMERICA:

To The Territory of New Mexico, *ex. Rel.* Bird S. Coler and E. T. Chapman, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, within sixty days from the date hereof, pursuant to an appeal taken from the Supreme Court of the Territory of New Mexico, in a certain cause therein pending, and Numbered 1122, wherein the Board of County Commissioners of Santa Fe County, *et al.*, were appellants and you were appellees, to show cause if any there be, why the judgment rendered against the said appellants, as the said appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States, and the seal of the Supreme court of the Territory of New Mexico this the 24: day of October, A. D. 1907.

[Seal Supreme Court Territory of New Mexico.]

WILLIAM J. MILLS,
Chief Justice Supreme Court of the Territory of New Mexico.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

I, Charles A. Spiess, Attorney of record in the Supreme Court of the Territory of New Mexico of the Appellees to the within citation, in said causes in said court, hereby acknowledge service upon me for said Appellees, as their attorney of record as aforesaid of the within citation, this 16th day of December, 1907.

CHARLES A. SPIESS,
Attorney for Appellees, Las Vegas, N. M.

48 In the Supreme Court of the United States, October Term, 1907.

No. 543. No. 1122, S. C. N. Mex.

TERRITORY OF NEW MEXICO, *ex Rel.* BIRD S. COLER ET AL., Appellees,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE, Appellant.

Assignments of Error.

Now comes the appellant, The Board of County Commissioners of the County of Santa Fe, by T. B. Catron, Esq., its attorney, and says that the Supreme Court of New Mexico, in the said cause, erred, in the following respects, that is to say:

1. In affirming the judgment of the District Court of the First Judicial District of the Territory of New Mexico, for the County of Santa Fe, because the said judgment was contrary to the law and the facts, and unauthorized by any pleading or proof, and particularly for the reasons hereinafter stated.

2. There was no proof or admission before the district court upon which to determine the amount of levy to be ordered, if any, and no fact or facts upon which to found a judicial deduction in this regard.

3. The relators' petition did not state the taxable values of the said County of Santa Fe and there was no proof on the subject, and there was no other legal means before the court to enable it to determine a requisite levy.

4. The action of the district court in requiring a levy of ten mills to be made was arbitrary and improvident, there having been no foundation laid, in pleading or proof, to that end.

5. The Supreme Court of New Mexico in affirming the judgment of the District Court departed, without warrant of law, from the theory of the relators' petition, and from the theory of the judgment of the District Court, in this that those theories were that no provision had been made for the payment of the fundamental judgments, with their interest and costs, whereas such provision
49 had been made by an ample levy on February 7, 1901, which was ignored in the said petition and which was not shown to have been exhausted, and that the relators were entitled to a levy for all, if any, of their judgment, with interest and costs, while the Supreme Court of New Mexico, assuming that some interest was due, restricted the judgment and writ of mandamus to the levy of taxes for the payment of such interest.

6. The Supreme Court of New Mexico erroneously assumed and deduced that the taxable values of the County of Santa Fe on the 22nd of August, 1905, when the levy herein complained of was ordered, were substantially $10649,806.00, because such valuation,

under a levy of 82 mills, would produce substantially $135,284.19, on February 7th, 1901.

7. The Supreme Court of New Mexico erroneously interpreted the appellant's resolution of February 7th, 1901, as meaning that a levy of 82 mills, on said day, would produce only $135,284.19, the principal of the judgment here involved and the judgment involved in Cause No. 544 on the docket of this court, taken together; whereas, the purpose and effect of the said resolution were to make a levy sufficient to pay the sum of $135,284.19, with interest *until paid,* and costs, pursuant to the writ of mandamus of January 25th, 1901.

8. There was no showing in the said District Court that the said levy of 82 mills for the purpose of compelling payment of the fundamental judgment herein and the fundamental judgment in said Cause No. 544 was insufficient to meet the principal and the interest, *until paid.*

9. The judgment of the Supreme Court of New Mexico is in effect an original writ of mandamus or, in effect, authorizes an original writ of mandamus, without authority of law.

50 10. The Supreme Court of New Mexico erred in sustaining the action of the said District Court in granting a peremptory writ of mandamus, in the first instance, without a hearing or opportunity for hearing given the respondent board, there being matter of fact to be adjudged, for instance, the taxable valuation of the County of Santa Fe at the time, the amount of levy proper and just, if any there should be, the status of the levy of February 7th, 1901, and the amount of money, if any, produced thereby, the amount of money which said last mentioned levy could, should and would produce, and other matters of fact apparent.

11. The Supreme Court of New Mexico should not have held that the motion of the respondent, in the district court, for an opportunity to be heard, supplied any lack of fact or jurisdiction which existed in the proceedings up to the time of the filing of said motion.

12. The petition of the relators in the said District Court did not state facts sufficient to constitute a cause of action against the respondents thereto.

13. The Supreme Court of New Mexico erred in holding that the bonds behind the judgment in question herein were valid and enforcible.

14. The Supreme Court of New Mexico erred in holding, without looking behind the judgment herein, in effect, that the act of alleged validation of the said bonds was intelligible, operative and enforcible.

15. The Supreme Court of New Mexico should have reversed the judgment of the said District Court and remanded said cause for hearing on the merits, so that, among other things, it might be seen whether the said judgment rested upon valid and enforcible obligations.

51 16. The said District Court was without authority or jurisdiction to issue or grant said writ of mandamus, here in question, because there existed a plain, speedy and adequate remedy under the statute, Secs. 340 *et seq.,* Compiled Laws of New Mexico

of 1897, if the identity of the bonds validated be established, and because no demand of performance is shown to have been made, and because no duty required by law rested upon the respondent to make the levy here in question, the said levy of 82 mills outstanding.

17. The said District Court erred in overruling the respondent's motion and petition to be granted an opportunity to answer and be heard, and the Supreme Court of New Mexico erred in sustaining such ruling of the said District Court, and all the ground therein stated are herein and hereby adopted, and they are hereby referred to and made a part hereof.

For all of which reasons, the said cause should be reversed and remanded with instructions that the Supreme Court of New Mexico require the said District Court to dismiss the same.

T. B. CATRON,
Attorney for Appellant.

52 [Endorsed:] No. 543. Supreme Court of the United States. No. 112. Supreme Court of New Mexico. Territory of New Mexico *ex rel.* Bird S. Coler *et al. vs.* Board of County Commissioners of Santa Fe County. Assignment of Errors. T. B. Catron, Att'y for Appellant.

53 [Endorsed:] File No. 20,946. Supreme Court U. S., October Term, 1907. Term No. 543. The Board of County Commissioners of Santa Fe County *et al.*, App'ts, *vs.* The Territory of New Mexico *ex rel.* Bird S. Coler *et al.* Assignment of Errors. Filed Jan'y 9th, 1908.

Endorsed on cover: File No. 20,946. New Mexico Territory, supreme court. Term No. 229. The Board of County Commissioners of Santa Fe County *et al.*, appellants, *vs.* The Territory of New Mexico *ex Rel.* Bird S. Coler and E. T. Chapman. Filed December 23d, 1907. File No. 20,946.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900

No. [redacted]43.

THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY ET AL., APPELLANTS,

vs.

THE TERRITORY OF NEW MEXICO *EX REL.* BIRD S. COLER AND E. T. CHAPMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED DECEMBER 28, 1900.

(20,947.)

(20,947.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 230.

THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY ET AL., APPELLANTS,

vs.

THE TERRITORY OF NEW MEXICO *EX REL.* BIRD S. COLER AND E. T. CHAPMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 Be it remembered that heretofore, on, to wit, on the 28th day of November, A. D. 1905, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a transcript of record in a certain cause entitled The Territory of New Mexico *ex rel.* Bird S. Coler *et al.*, appellees, *vs.* The Board of County Commissioners County of Santa Fe *et al.*, numbered 112, which said transcript of record was and is in words and figures following, to wit:

2 In the District Court of the First Judicial District of the Territory of New Mexico in and for the County of Santa Fe.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

Pleas before the Honorable John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the First Judicial District thereof, and of the District Court within and for the County of Santa Fe, in said District.

Be it remembered that heretofore to-wit, on the 22nd, day of August, A. D., 1905, there was filed in the office of the Clerk of the said Court, a petition which petition is in words and figures to-wit:

In the District Court of the First Judicial District, Territory of New Mexico, County of Santa Fe.

No. 4747.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY, and the Members Thereof, to wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROIVAL, Respondents.

To the Honorable John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the First Judicial District Court thereof.

Come now the above named petitioners and relators by their attorneys, Charles A. Spiess and S. B. Davis, Jr., and respectfully inform this honorable Court as follows:

(1st) That on to-wit, the 24th, day of September, A. D. 1906, Your relators recovered judgment in this Court against the
3 respondents, the board of county commissioners of the county of Santa Fe, in the sum of Seventy four Thousand Three Hundred and Fifty-eight Dollars and seventeen cents for and on account of coupons then past due from certain bonds, theretofore

issued by the County of Santa Fe, in the Territory of New Mexico, said judgment being rendered in that certain cause Numbered 4091 on the Civil Docket of the District Court of Santa Fe County, New Mexico, entitled Bird S. Coler and Elverton R. Chapman, plaintiffs, *vs.* The board of county commissioners of the County of Santa Fe, defendant, which said judgment is recorded in book H, page 399, of the records of said court, a copy of which said Judgment is hereto attached, hereby referred to and made a part hereof, being designated as Exhibit A.

(2d) That by said judgment it was ordered, among other things that the defendant, the Board of County Commissioners of Santa Fe County, New Mexico, should forthwith cause the said Seventy-four Thousand Three Hundred and Fifty-eight Dollars, and seventeen cents and the interest thereon due and to become due, at the rate of five percentum per annum from said date, to be assessed and levied upon and out of the taxable property situate in the said County of Santa Fe, and to cause the same to be collected in the manner provided by law, and to pay the same out of the treasury of said County to the said plaintiffs, their legal representatives, or assigns, upon the delivery of a proper voucher or vouchers therefor.

(3d) That no part of said judgment, nor of the interest thereon has ever been paid, and as plaintiffs are informed and believe the defendant has wholly failed to collect any sum whatsoever from the taxes or otherwise for the payment of said judgment, and relators are informed and believe that there is now no money or funds whatsoever in the treasury of Santa Fe County, New Mexico appli-
4 cable to the payment of said judgment and that there is now due and unpaid on said judgment the sum of $92,724.63.

(4th) That the above named respondents, Arthur Seligman, A. L. Kendall and Jose Inez Roival, are the duly elected, qualified and acting county commissioners of the said County of Santa Fe, and as such are charged with the duty under the laws of the Territory of New Mexico of making a levy of taxes and ordering the collection of the same for the purposes of paying said judgment and the interest and costs thereon according to the terms thereof.

(5th) That relators are informed and believe that the said respondents acting as the Board of County Commissioners of said Santa Fe County, at a meeting held by them during the month of July or August A. D. 1905, made the levy of taxes upon the taxable property of said Santa Fe County, New Mexico, for the purpose of raising funds for the territorial, county, school and other purposes for the year 1905, but relators state the fact to be that the respondents have wholly failed and refuse and still fail and refuse to make any levy whatsoever, for the said year 1905, for the purpose of raising funds to pay the aforesaid judgment and interest and costs thereon.

(6th) That relators, Bird S. Coler and Elverton R. Chapman, are beneficially interested in the said judgment, being the judgment creditors and the present holders of said judgment, and that relators have no plain, speedy or adequate remedy in the ordinary course of law.

Wherefore, your relators pray that a peremptory writ of man-

damus in due form, be at once issued from this court, commanding and requiring the said respondents to convene at the court house in Santa Fe, New Mexico, on or before Tuesday the 31st day of August, A. D. 1905, in special session, as the Board of County
5 Commissioners of Santa Fe County, New Mexico, and then and there make special levy of taxes upon all the taxable property within the limits of the County of Santa Fe and Territory of New Mexico of ten mills on each dollar of such taxable property, for the purpose of paying a portion of the judgment aforesaid, with the interest and costs thereon, and that on each and every year hereafter until the said judgment, interest and costs be fully paid, the respondents, the Board of County Commissioners of the County of Santa Fe, New Mexico, shall at the time of its making of the levy of taxes for other purposes levy a special tax in the sum of ten mills on each dollar of taxable property within said limits of Santa Fe County; and further that by said writ it be ordered and directed that such moneys when collected shall be paid over out of the treasury of said Santa Fe County to relators, their legal representatives or assigns, upon the delivery of proper voucher or vouchers therefor, and that the money so paid shall be first applied to the payment of interest and costs of said judgment and then to the principal thereof, and further that judgment may be rendered in this action in favor of relators for the costs herein.

CHAS. A. SPIESS AND
S. B. DAVIS, JR.,
Attorneys for Relators, Las Vegas, N. M.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

Stephen B. Davis, Jr., being duly sworn on oath deposes and says; that he has read the foregoing petition and know the contents thereof, and the same is true of his own knowledge, except as to the matters and things therein stated upon information and belief and as to such matters and things he believes the same to be true; that he is one of the attorneys for the foregoing relators and peti-
6 tioners, and that he makes this verification for the reason that said relators and petitioners are not within the Territory of New Mexico, but reside in the State of New York.

STEPHEN B. DAVIS, JR.

Subscribed and sworn to before me this 22nd day of August, A. D. 1905.

[SEAL.]

W. A. BARNEY,
Notary Public, Santa Fe County, New Mexico.

(Record H, Page 399.)

Exhibit "A."

In the District Court, First Judicial District, Territory of New Mexico, County of Santa Fe.

No. 4091. Civil.

Bird S. Coler and Elverton T. Chapman, Plaintiffs,
vs.
The Board of County Commissioners of the County of Santa Fe, Defendants.

Now on this 24th day of September A. D. 1900, this cause having been called for trial, on the issues joined herein, the parties announce themselves ready for trial, N. B. Laughlin Esqr., and Charles Waterman Esqr., appearing for the plaintiffs, R. C. Gortner, Esqr., district attorney for the First Judicial District of the Territory of New Mexico, appearing for the defendant, and the parties having heretofore in open court expressly waived of record, a trial by jury, submitted their cause of action, of law as of fact, to the Court, and the court having heard the same, and the evidence offered by both the plaintiff and the defendant, and now being fully advised in the premises, doth find all of the issues joined therein in favor of the plaintiffs and against the defendant, and the law and facts are with the plaintiffs, and the court does hereby assess the plaintiffs damages in the sum of Seventy-four Thousand Three Hundred and Fifty-eight Dollars and seventeen cents, for which amount plaintiffs are entitled to a judgment against the said defendant.

Wherefore, in accordance with the findings of the court herein: It is considered, ordered and adjudged by the Court, that the said Plaintiffs, Bird S. Coler, and Elverton T. Chapman, do have and recover of and from the said defendant, The Board of County Commissioners of the County of Santa Fe, the sum of seventy-four thousand three hundred and fifty-eight dollars and seventeen cents, the sum of their damages assessed as aforesaid, with interest thereon from this date, at the rate of five per centum per annum until this judgment shall be paid together with the costs in this behalf laid out and expended, to be taxed.

And it is further ordered and adjudged that the defendant, The Board of County Commissioners of Santa Fe County does forthwith cause the said seventy-four thousand three hundred and fifty-eight dollars and seventeen cents, and the interest thereon due, and to grow due thereon, at the rate of five per centum per annum from this date, and costs, to be assessed and levied upon and out of the taxable property situate in the said County of Santa Fe, and to cause the same to be collected in the manner provided by law, and to be paid out of the treasury of said county to the said plaintiffs their legal representatives or assigns, upon the delivery of proper voucher or vouchers therefor. And it is so ordered. And it is further ordered that no costs herein be taxed against plaintiffs

which said petition is endorsed as follows, to-wit:

No. 4747, Territory of New Mexico County Santa Fe, In the District Court. The Territory of New Mexico at the relation of
8 Bird S. Coler and Elverton T. Chapman, Petitioners, *vs.* The Board of County Commissioners of the County of Santa Fe, and the members thereof, to-wit: Arthur Seligman, A. L. Kendall and Jose Inez Roibal, Respondents. Mandamus. Petition, Filed in my office, August 22, 1905. A. M. Bergere, Clerk. Chas. A. Spiess, S. B. Davis, Jr., Las Vegas, N. M. Atty's for Relators.

And thereafter, and on to-wit, the 22d day of August, A. D. 1905, there was issued out of the office of the Clerk of this Court a peremptory writ of madamus, which said peremptory writ of mandamus is in words and figures as follows to-wit:

In the District Court for the First Judicial District, Territory of New Mexico, County of Santa Fe.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE and the Members Thereof, to wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROIBAL, Respondents.

Mandamus.

Whereas, on the twenty-second day of August, A. D. 1905, there was duly filed and presented to the District Court of Santa Fe County, New Mexico, a petition in the above entitled cause, praying for a peremptory writ of mandamus, which petition is in words and figures as follows, to-wit:

9 In the District Court for the First Judicial District, Territory of New Mexico, County of Santa Fe.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE and the Members Thereof, to-wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROIVAL, Respondents.

Mandamus.

To the Honorable John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the First Judicial District Court thereof:

Come now the above named petitioners and relators by their attorneys Charles A. Spiess and S. B. Davis Jr., and respectfully inform this Court as follows:

(1st) That on to-wit the 24th. day of September, A. D. 1900, Your relators recovered judgment in this Court against the respondents the Board of County Commissioners of the County of Santa Fe, in the sum of Seventy-four Thousand Three Hundred and Fifty-eight Dollars and seventeen cents, for and on account of coupons then past due from certain bonds, theretofore issued by the County of Santa Fe, in the Territory of New Mexico, said judgment being rendered in that certain cause numbered 4091 on the civil docket of Santa Fe, New Mexico, entitled Bird S. Coler, and Elverton T. Chapman, plaintiffs, *vs.* The Board of County Commissioners of the County of Santa Fe, defendant, which said judgment is recorded in book H, page 399 of the records of said court, a copy of which said judgment is hereto attached, hereby referred to and made a part hereof, being designated as Exhibit A.

(2nd) That by said judgment it was ordered, among other things that the defendant, the Board of County Commissioners of Santa Fe County New Mexico, should forthwith cause the said Seventy-
10 four thousand three hundred and fifty-eight dollars and seventeen cents and the interest thereon due and to become due, at the rate of five per centum per annum from this date, to be assessed and levied upon and out of the taxable property situate in the said County of Santa Fe, and to cause the same to be collected in the manner provided by law, and to pay the same out of the treasury of said county to the said plaintiff, their legal representatives, or assigns, upon the delivery of a proper voucher or vouchers thereof.

(3rd) That no part of said judgment, nor of the interest thereon has ever been paid, and as relators are informed and believe the respondent has wholly failed to collect any sum whatsoever from taxes or otherwise for the payment of said judgment, and relators are informed and believe that there is now no money or funds whatsoever in the treasury of Santa Fe County, New Mexico, applicable to the payment of said judgment and that there is now due and unpaid on said judgment the sum of $92,724.63.

(4th.) That the above named respondents Arthur Seligman, A. L. Kendall and Jose Inez Roibal, are the duly elected, qualified and acting County Commissioners of the said County of Santa Fe, and as such are charged with the duty under the laws of the Territory of New Mexico of making a levy of taxes and ordering the collection of the same for the purpose of paying said judgment and the interest and costs thereon according to the terms thereof.

(5th.) That relators are informed and believe that the said respondents acting as the Board of County Commissioners of said Santa Fe County, at a meeting held by them during the month of July or August A. D. 1905, made a levy of taxes upon the taxable property of said Santa Fe County, New Mexico, for the pur-
11 pose of raising funds for territorial, county, school and other purposes for the year 1905, but relators state the fact to be that the respondents have wholly failed and refuse and still fail and refuse to make any levy whatsoever, for the year 1905, for the purpose

of raising funds to pay the aforesaid judgment and the interest and costs thereon.

(6th.) That relators, Bird S. Coler and Elverton T. Chapman, are beneficially interested in the said judgment, being the judgment creditors and the present holders of said judgment and that relators have no plain, speedy or adequate remedy in the ordinary course of law.

Wherefore, Your relators pray that a peremptory writ of mandamus in due form, be at once issued from this court, commanding and requiring the said respondents to convene at the Court House in Santa Fe, New Mexico, on or before Thursday the 31st day of August, A. D. 1905, in special session, as the Board of County Commissioners of Santa Fe County, New Mexico, and then and there make a special levy of taxes upon all the taxable property within the limits of the County of Santa Fe, Territory of New Mexico of ten mills on each dollar of such taxable property for the purpose of paying a portion of the judgment aforesaid, with the interest and costs thereon, and that on each and every year hereafter until said judgment, interest and costs be fully paid, the said Respondents, the Board of County Commissioners of Santa Fe County, New Mexico, shall at the time of its making of the levy of taxes for other purposes levy a special tax in the sum of Ten Mills on each dollar of taxable property within said limits of Santa Fe County; and further that by said writ it be ordered and directed that such moneys when collected shall be paid over out of the treasury of said Santa Fe County to
12 relators, their legal representative or assigns, upon the delivery of proper voucher or vouchers therefor: and that the money so paid shall be first applied to the payment of interest and costs of said judgment and then to the principal thereof, and further that judgment may be rendered in this action in favor of relators for the costs herein.

CHAS. A. SPIESS AND
S. B. DAVIS, JR.,
Attorneys for Relators, Las Vegas, N. M.

TERRITORY OF NEW MEXICO,
County of Santa Fe:

Stephen B. Davis, Jr., being duly sworn on oath deposes and says: that he had read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as — the matters and things therein stated upon information and belief and as to such matters and things he believes the same to be true; that he is one of the attorneys for the foregoing relators and petitioners, and that he makes this verification for the reason that said petitioners are not within the Territory *for* New Mexico, but reside in the State of New York.

STEPHEN B. DAVIS, JR.

Subscribed and sworn to before me this 22nd day of August, A. D. 1905.

[SEAL.]

W. A. BARNEY,
Notary Public, Santa Fe County, New Mexico.

And the Court having read and considered the said petition and having heard the attorneys for relators, in support thereof, and it appearing to the Court that the right to require the performance of the acts set out in the prayer of said complaint, is clear, and it being apparent that no valid excuse can be given by respondents for
13 performing the said acts in accordance with the prayer of said petition, and the court being now sufficiently advised and informed in the premises:

It is therefore ordered, considered and adjudged, that a peremptory writ of mandamus issue out of this Court in accordance with the prayer of said petition:

Therefore, This is to command you, The Board of County Commissioners of Santa Fe County, New Mexico, and you the said Arthur Seligman, A. L. Kendall, and Jose Inez Roibal, members of said board convene at the Court house of said Santa Fe County, on or before Thursday, the 31st day of August, A. D. 1905, in special session, as the Board of County Commissioners of Santa Fe County, New Mexico, and then and there to make a special levy of taxes upon all the taxable property within the limits of the County of Santa Fe, and Territory of New Mexico, of ten mills, on each dollar of such taxable property for the purpose of paying a portion of the said judgment of relators with the interest and costs thereon; and further, to command you, that on each and every year hereafter, until the said judgment, interest, and costs be fully paid, you do, at the time of the making of the levy of taxes for other purposes in said county, levy a special tax in the sum of Ten Mills on each dollar of taxable property within said limits of Santa Fe County, for the said purpose; and further that such moneys, when collected, shall be paid over out of the treasury of Santa Fe County to relators, their legal representatives or assigns, upon the delivery of a proper voucher or vouchers therefor, and that the moneys so paid shall be first applied to the payment of interest on said judgment and the costs thereof, and then to the principal thereof; that on the 1st day of September, A. D. 1905, and on the 1st day of September of each succeeding year, until the same said judgment interest and costs shall have
14 been fully paid and satisfied, you make return of this writ, showing in what manner you have obeyed it.

And hereof fail not.

Witness the Honorable John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the First Judicial District thereof, and the seal of said District Court, this 22nd day of August, A. D. 1905.

[SEAL.] JOHN R. McFIE,
Associate Justice, etc.
A. M. BERGERE, *Clerk.*

It is ordered, That the foregoing peremptory writ of mandamus issue out of this court and that service thereof be made by serving upon the above named Arthur Seligman, A. L. Kendall, and Jose Inez Roibal, and delivering to each of them, a certified copy thereof.

Dated this 22nd day of August, 1905, at Santa Fe, New Mexico.

JOHN R. McFIE,
Associate Justice.

Which said peremptory writ of mandamus is endorsed as follows to-wit: No. 4747, District Court Santa Fe County. The Territory of New Mexico, at the relation of Bird S. Coler and Elverton T. Chapman, petitioners and respondents, *vs.* Mandamus. The Board of County Commissioners of the County of Santa Fe, *et al.* Respondents. Peremptory writ of Mandamus. Filed in my office August 30, 1905. A. M. Bergere, Clerk.

And thereafter and on to wit, the same said 30th day of
15 August, A. D. 1905, the said writ was duly returned to the office of the Clerk of this Court endorsed in figures and words as follows to-wit:

TERRITORY OF NEW MEXICO,
County of Santa Fe:

I, Antonio J. Ortiz, sheriff of Santa Fe County, New Mexico, do hereby certify that I served the within writ upon the within named defendants, within my said county by delivering to each of them in person a true copy thereof duly certified by the Clerk of this Court upon the following dates: To Arthur Seligman, August 28th, 1905. To A. L. Kendall, August 29th, 1905. To Jose Inez Roival, August the 29th, 1905.

Witness my official signature this 30th day of August A. D., 1905.

ANTONIO J. ORTIZ,
Sheriff Santa Fe County, New Mexico,
By JOSE L. LOPEZ,
His Deputy.

And thereafter, and on to-wit, the 26th day of August, A. D. 1905, there was filed in the office of the Clerk of the Court a petition and motion, which said petition and motion is in words and figures as follows to-wit:

In the District Court for the First Judicial District, Territory of New Mexico, County of Santa Fe.

Petition.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE and the Members Thereof, to wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROIVAL, Respondents.

Comes now the respondents, the Board of County Commissioners of the County of Santa Fé, and the members thereof to wit:
16 Arthur Seligman, A. L. Kendall, and Jose Inez Roival and move and petition the court as follows:

I.

That on the 24th day of September, 1900, the date of rendition of the judgments in causes number 4091 and 4092 civil in the District Court of Santa Fe County Territory of New Mexico all of the property subject to taxation within the County of Santa Fe as then existing was made subject to the payment of its pro rata of said judgments.

That the Thirty Fifth Legislative Assembly of the Territory of New Mexico eliminated a portion of Santa Fe County and attached the same to the County of Rio Arriba and that said eliminated portion of Santa Fe County was by said act of the legislative assembly held liable and subject to its portion of the indebtedness of Santa Fe County.

That the Thirty Fifth Legislative Assembly of the Territory of New Mexico eliminated another portion of the County of Santa Fe and included the same in the county then created and now known as the County of Torrance.

That all of the taxable property now lying and being in said portions of the Counties of Rio Arriba and Torrance is now liable and subject to its portion of said indebtedness included in the said judgments the same as the property situate and being within the present boundaries of the County of Santa Fe. The County Commissioners of the County of Santa Fe are without jurisdiction to assess and levy any taxes upon the property now included within the Counties of Rio Arriba and Torrance.

That the peremptory mandamus issued in the above entitled cause includes only the property and Territory within the present
17 boundaries of the County of Santa Fe and does not pretend to include the property and Territory situate in the former portions of the County of Santa Fe and being now portions of the Counties of Rio Arriba and Torrance. That the calculation of the interest levy ordered in said peremptory writ is not therefore based upon the entire property and Territory subject to the payment of said judgments.

II.

Respondents further show to the court that a writ of mandamus was issued out of the District Court on the 25th day of January 1901 in the case of the Territory of New Mexico *ex rel.* Coler *et al. vs.* The Board of County Commissioners, requiring the respondents to levy a tax upon the taxable property situate in the said County of Santa Fe sufficient in amount to produce the sum of $135,284.19 with interest thereon from the 24th day of September A. D. 1900, until paid at the rate of five per cent. per annum together with the further sum of $30.00 costs, the said sum being for the amount of the judgment in cases number 4091 and 4092 of the District Court of Santa Fe County.

That upon the 7th day of February, 1901, the Board of County Commissioners of the County of Santa Fe, in obedience to the said writ of mandamus made a levy of eighty two mills on each dollar upon the taxable valuation of the property of the County of Santa Fe,

and certified the same to the treasurer and *ex-officio* collector of the County of Santa Fe, and directing him, the said collector to place the said levy upon the tax rolls of said county and proceed immediately thereafter to collect the same in the manner provided by law, in obedience to and full compliance with the order contained in said writ of mandamus and judgment in the said cases number
18 4091 and 4092 of the District Court of Santa Fe County, all of which is shown by the record of the Commissioners' proceedings, a certified copy of which is hereto attached and made a part hereof.

That the said levy of eighty two mills aforesaid is standing upon the tax rolls of the County of Santa Fe as a lien upon and against all of the property of the County of Santa Fe as then existing subject to the payment aforesaid.

That the County Commissioners are without authority in law to enforce the collection of the said levy of eighty two mills.

That the said levy of eighty two mills is ample and sufficient to cover the amount of the judgment in cases number 4091 and 4092 aforesaid.

III.

That the levy of ten mills on each dollar of the taxable property of the County of Santa Fe for the purpose of paying of said judgment of relators with interest and costs thereon, and the same levy for each and every year is for the purpose of paying the same obligation as the eighty two mill levy aforesaid and is largely in excess of the amount required to pay the said judgment, interest and costs, and is therefore unjust and wrongful to the tax payers and property interests of the County of Santa Fe.

IV.

That the payment of the judgment rendered in cases No. 4091 and 4092 by the levy of a tax of ten mills annually for each and every year until the said judgments are paid is unjust and unfair to the taxpayers of the County of Santa Fe and ruinous to the progress and prosperity of the entire county in this that a lien twice as large as necessary is placed upon the real estate and property of said
19 county and the taxpayers who pay taxes will be required year after year to pay the proportion of the said levy of those who refuse to pay the said ten mill levy.

V.

The respondents are entitled to be heard as to the amount of levy necessary and whether any levy should be ordered, there existing upon the tax rolls a legal and adequate levy to cover said judgment.

VI.

Respondents further allege that it is impossible to determine the amount of levy necessary to be made for the year succeeding the year of 1905, until the tax rolls for said year shall have been completed and the amount of taxable property determined. That the respond-

ents should not be held in default of their official duties of making a levy for said years until the time arrives that the said levy can be made and they shall have failed to perform their duty as enjoined and required by law.

VII.

That the levy of the tax as directed and required in the peremptory writ is not an act which the law specially enjoins as a duty resulting from an office, trust and station, because the levy of eighty-two mills to pay the same judgment as ordered by the court in said cases number 4091 and 4092 was made by the respondents and is ample and sufficient to pay said judgments when collected. That it is not the duty of respondents to collect the aforesaid levy but the duty of the treasurer and *ex-officio* collector of Santa Fe County.

VIII.

That relators have a plain, speedy and adequate remedy in the ordinary course of law.

For a further and additional ground of motion, the respondents say:

(*a*) That the act of congress whereby the bonds in question are pretended to have been validated, approved and confirmed, is indefinite, uncertain and incapable of reasonable interpretation and inforcement so as to be applied to any bonds issued by the County of Santa Fe.

(*b*) That the said act of congress does not sufficiently indentify any bonds of the said county so as to apprise the board of county commissioners of the said county of the bonds intended to be validated, approved and confirmed.

(*c*) That no bonds of the said county, in the amount of $172,500.00, dated March 1st, 1892, issued under the provisions of an act of the territorial general assembly, known as the refunding act, in refunding and in lieu of $150,000.00 of bonds and overdue interest thereon, of said County of Santa Fe, theretofore issued and outstanding, were ever issued by the said County of Santa Fe, but bearing said date, issued under the provisions of an act of the Territorial General Assembly, known as the refunding act, in refunding and in lieu of one hundred and fifty thousand dollars of bonds, and the overdue interest thereon of the said county and the overdue interest thereon, issued and outstanding, were issued bonds of the said county in an amount far in excess of the said sum of $172,500.00, and it can not be understood from the said act whether all of such issues have been validated by the said act of congress, or whether only an amount thereof not exceeding, $172,500.00 and if no more than $172,500.00 in amount, which of said bonds are validated, nor in whose hands such bonds or any part thereof are validated.

(*d*) That the said bonds so pretended to have been validated are the subjects of different ownership and are not all in the hands of any one person, but in the hands of divers persons, and it cannot be determined from the said act of congress what holder of said bonds in excess of the amount named in the said act of congress shall not have the benefits of validation.

(*e*) That the total amount of bonds issued by the said County of Santa Fe, issued as aforesaid in excess of $172,500.00 is not less than $200,000.00, under the said refunding act.

(*f*) That at the time of the passage of the said act of congress and its becoming a law by limitation, there was more than one act called and known as "refunding act" in force in the Territory of New Mexico, by enactment of its Legislative Assembly, but what refunding act is referred to by the said act of congress is not disclosed.

Wherefore respondents pray that the peremptory order be suspended herein and that they may be permitted to show cause and be heard before the said order and writ is made permanent.

THE BOARD OF COUNTY COMMISSIONERS
OF SANTA FE COUNTY,
By E. C. ABBOTT,
District Attorney.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

Arthur Seligman, being first duly sworn upon his oath says he is chairman of the Board of County Commissioners and respondent herein, that he has read the foregoing petition and knows the contents thereof and that the allegations thereof are true except those stated upon information and belief and as to those he believes them to be true.

ARTHUR SELIGMAN,
Chairman B. of C. Com.

Subscribed and sworn to before me this 26th day of August 1905.

A. M. BERGERE,
Clerk of Court.

22 Writ of Peremptory Mandamus.

SANTA FE, N. M., *February 7th,* 1901.

The Board of County Commissioners met pursuant to Writ of Peremptory Mandamus issued out of the District Court.

Present W. H. Kennedy, Jose A. Lujan, Arthur Seligman Commissioners and Manuel Delgado, Clerk.

N. B. Laughlin appeared for the plaintiffs, and Mr. R. C. Gortner for the County Commissioners defendants, after having considered the said writ of mandamus, the following was adopted:

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

On this February the 7th, 1901, the Board of County Commissioners being assembled in pursuance of the writ of the peremptory mandamus issued out of the District Court in and for the County of Santa Fe, on January 25th, 1901, in the matter of the Territory of New Mexico, *ex rel.* Coler *et al. vs.* Board of County Commissioners Etc., and having considered, the writ of mandamus, and endeavored to ascertain how large a tax levy upon, and out of all the taxable

property situate in said County of Santa Fe, will be sufficient in amount to produce the sum of $135,284.19 with interest thereon from the 24th day of September A. D. 1900 until paid at the rate of five per-centum per-annum together with the further sum of thirty dollars and costs and being unable to calculate how much will be the amount of said interest, until paid as aforesaid but having considered the matter does hereby make, and order and direct a levy upon every dollar of taxable property existing this day in the said County of Santa Fe, to the amount of eight and one fifth cents thereon for the purposes aforesaid and said board does hereby certify the said levy to the collector of taxes of the said County of
23 Santa Fe, and does direct him the said collector to place the said levy upon the tax rolls of said county and to proceed immediately thereafter to collect the same in the manner provided by law in such cases made and provided and does direct its clerk to serve a copy hereon on the said collector.

W. H. KENNEDY,
ARTHUR SELIGMAN,
JOSE A. LUJAN,
Board of County Commissioners, Santa Fe County.

Attest:
MANUEL DELGADO.

W. H. KENNEDY,
Chairman.

In witness whereof I set my hand and affixed my official seal this 24th day of August, A. D. 1905.

MARCOS CASTILLO,
[SEAL.] *Probate Clerk and ex-Officio Recorder of Santa Fe County, New Mexico.*

No. 4747, District Court Santa Fe County.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

I, Marcos Castillo, Probate Clerk and Ex-Officio Recorder of Santa Fe County, duly certify, that this is a true copy of the proceedings of county commissioners of Santa Fe county held on the 18th day of January, 1901.

N. B. Laughlin Esqr., appeared before the board on behalf of Bird S. Coler and Elverton R. Chapman and demanded tax levy and made a verbal and written demand to immediately make a levy on all the taxable property situate in said County of Santa Fe, and certify such levy to the collector of taxes of your county and direct him to place the same on his tax rolls in his office and to proceed imme-
24 diately to collect the same in a sufficient sum to pay judgments recovered by said Coler and Chapman against the Board of County Commissioners of Santa Fe County, in the District Court of the County of Santa Fe, in cases numbered 4091 and 4092, in the said court, in the aggregate sum of One Hundred and Eighty Four Dollars and Nineteen cents, with interest thereon at five per

centum per-annum from September 24th, 1900, until paid, with the costs accrued thereon in the sum of Thirty Dollars.

The matter was referred to the district attorney for his opinion thereon.

Summons in case No. 4238, First Judicial District Court, County of Santa Fe, entitled George M. Black *vs.* The Board of County Commissioners of the County of Santa Fe, was received by the board and same was ordered referred to the district attorney for opinion on the same. The board of county commissioners then adjourned subject to the call of the chairman.

W. H. KENNEDY,
Chairman.

MANUEL DELGADO, *Clerk.*

Which said petition and motion is endorsed as follows to-wit: Bird S. Coler, *et al, vs.* The Board of County Commissioners of Santa Fe County. Petition and Motion. Filed in my office August 26, 1905. A. M. Bergere, Clerk. E. C. Abbott, District Attorney.

And thereafter and on to-wit, the 31st of October, A. D. 1905, there was filed in the office of the Clerk of this Court an Order
25 overruling motion and petition of Respondents, which Order is in words and figures as follows to-wit:

In the District Court of the First Judicial District, Territory of New Mexico, County of Santa Fe.

No. 4747.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY and the Members Thereof, to wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROYBAL, Respondents.

Order.

This cause coming on to be heard this 29th day of August upon the petition and motion of respondents praying for the suspensions of the peremptory writ until after a hearing, the respondents being represented by E. C. Abbott, District Attorney, A. B. Renehan, Esq., and the relators being heard by Stephen B. Davis, Jr., Esqr., and the court having heard the motion and petition, and being fully advised in the premises.

It is therefore considered, ordered, and adjudged, by the court that the said motion and petition be and the same is hereby overruled, to which order the respondents duly except.

JOHN R. McFIE,
Judge, etc.

Which said Order is endorsed as follows to-wit: No. 4747, District Court, Santa Fe County. Territory of New Mexico *ex rel.* Bird S. Coler *et al. vs.* The Board of County Commissioners of Santa
26 Fe County etc. Order overruling motion and petition of Respondents. Filed in my office Aug. 31st, 1905. A. M. Bergere, Clerk. E. C. Abbott, District Att'y. A. B. Renehan, Att'ys for Defendants.

And thereafter, and on to-wit, the 31st day of Aug. A. D. 1905, there was filed in the office of the Clerk of this Court an Order allowing an appeal, which said Order is in words and figures as follows to-wit:

In the District Court of the First Judicial District of the Territory of New Mexico, Sitting within and for the County of Santa Fe.

No. 4747.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE and the Members Thereof, to wit, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROIVAL, Respondents.

Order Allowing Appeal.

Now on this 31st day of August, 1905, this said cause coming on to be heard on the motion of the respondents heretofore filed herein for the allowance of an appeal to the Supreme Court of the Territory of New Mexico; the relators being represented by S. B. Davis, Jr., Esq., and the respondents being represented by E. C. Abbott, District Attorney, and A. B. Renehan, Esq., and the court having heard the arguments of counsel and being now fully advised in the premises finds, that the said respondents are entitled to an appeal to the Supreme Court of the Territory of New Mexico, and that said appeal shall operate as a supersedeas to stay the execution of judgment requiring the respondents to make a levy as required by said judgment in said cause and that no bond be required of respondents, the judgment being against the County of Santa Fe.

It is therefore ordered, considered and adjudged by the court that an appeal be and the same is hereby allowed from the judg-
27 ment of this Court herein to the Supreme Court of the Territory of New Mexico, by the respondents herein and that said appeal shall operate as a supersedeas to stay the execution of the said judgment requiring a levy by the respondents as specified in the said judgment and that no supersedeas bond be required herein.

Which Order is endorsed as follows to-wit: No. 4747, District Court, Santa Fe County. Territory of New Mexico *ex rel.* Coler *et al., vs.* Board of County Commissioners, Santa Fe County. Order allowing appeal. Filed in my office August 31st, 1905. A. M.

Bergere, Clerk. E. C. Abbott, District Attorney. A. B. Renehan, Att'ys for Respondents.

And thereafter, and on to-wit, the 5th day of October, A. D. 1905, there was filed in the office of the clerk of this Court a Præcipe, which said præcipe is in words and figures to-wit:

28 In the District Court in the Territory of New Mexico within and for the County of Santa Fe.

No. 4747.

THE TERRITORY OF NEW MEXICO at the Relation of BIRD S. COLER and ELVERTON T. CHAPMAN, Petitioners,

vs.

THE BOARD OF COUNTY COMMISSIONERS and the Members Thereof, ARTHUR SELIGMAN, A. L. KENDALL, and JOSE INEZ ROYBAL, Respondents.

To the Hon. Clerk of the District Court of the First Judicial District:

Please prepare a transcript of the record in the above entitled cause, of three copies, and including the following papers towit:

No. 1, Petition of Petitioners.
No. 2, Peremptory writ of Mandamus.
No. 3, Petition and motion of Respondents.
No. 4, Order overruling motion and petition of respondents.
No. 5, Order allowing appeal.

E. C. ABBOTT,
District Attorney.

Which said Præcipe is endorsed in words and figures as follows to-wit: No. 4747, District Court, Santa Fe County, Territory of New Mexico *ex rel.*, Bird S. Coler, *et al. vs.* The Board of County Commissioners, Santa Fe County. Præcipe. Filed in my office Oct. 5, 1905. A. M. Bergere, Clerk.

29 TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

I, A. M. Bergere, Clerk of the District Court of the First Judicial District, of the Territory of New Mexico and of the District Court of the County of Santa Fe, within said Territory, do hereby certify that the foregoing twenty-five (25), pages contain a full, true, and complete transcript of the record and proceedings had in a cause lately pending in said court, wherein the Territory of New Mexico, at the relation of Bird S. Coler, and Elverton T. Chapman, were petitioners, and the Board of County Commissioners of the County of Santa Fe, and the members thereof to-wit: Arthur Seligman, A. L. Kendall, and Jose Inez Roibal, were respondents, as the same now appears of record in my office.

In witness whereof, I have hereunto set my hand, and the seal of said Court, at my office in the City of Santa Fe, in the County and Territory aforesaid, this 20th day of October, A. D. 1905.

[SEAL.] A. M. BERGERE,
Clerk of said Court.

30 And afterwards, on to wit, *on* the 28th day of November A. D., 1905, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of error in the above entitled cause, which said assignment of error was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1905.

No. 1123.

THE TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL., Appellees,
vs.
BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY, Appellant.

Appeal from District Court, Santa Fe County.

Assignment of Errors.

Now come the respondents and appellants by E. C. Abbott, District Attorney for the Counties of Santa Fe and Taos, and A. B. Renehan, Esq., their attorneys, and assign the following as errors committed by the court below in the trial of this cause to wit:

1. That the judgment, allowance and issuance of the peremptory writ of mandamus herein was authorized in law;

2. That the court erred in issuing a peremptory mandamus in the first place without a hearing or opportunity for hearing given to the respondents;

3. That the court erred in denying the motion of the respondents to suspend the peremptory order herein and to permit them to show cause and to be heard before the said order and writ should be made permanent, because the grounds of the said motion and
31 each of them, constituted a lawful and meritorious defense to the said proceeding, to the petition and to the writ issued;

4. That the court erred in holding that the bonds in question were legal and enforcible;

5. That the court erred by holding in effect that the act of alleged validation of the said bonds was intelligible, operative and enforcible;

6. That the court erred in denying the said motion for a hearing because the respondents had in law a right to require that the Counties of Rio Arriba and Torrance should be proceeded against in the same action;

7. That the court erred in denying the said motion of the respondents for a hearing, because they had a right in law to be heard in

respect to the existing levy of February 7, 1901, for the same purpose as that sought in this proceeding, which constituted, if valid, a lien upon all the property within the said County of Santa Fe and upon which the levy sought in this proceedings would be cumulative without right in law, and without the elimination of the prior levy;

8. That the court erred in denying the motion of the respondents for a hearing, because they were entitled to be heard at least as to the amount of the levy which the court would make in said proceeding, if any, the same resting upon matter of fact essential to be proven.

9. That the court erred in so framing the said writ of mandamus as to cover successive years because the amount of levy, if any, which might be required in one year rather than another would depend upon circumstances and the valuation of property as it might be found by the assessing boards, and because the court in effect anticipated a refusal on the part of the respondents in subsequent years to make a levy for the matters in question in this proceeding, without any authority in law or fact for such anticipation, and
32 without any authority in law to extend the levy beyond the current fiscal year.

10. The court erred in denying the motion of the respondents for a hearing because of the grounds thereof set up in the eighth paragraph of the said motion, taken jointly and severally, the same constituting meritorious and substantial defenses to the cause of action set up by the petitioners;

11. The court erred in the issuance of the said mandamus so as to cover future years, in this, that it assumes that the personnel of the Board of County Commissioners of the said County would continue uncha-ged, and on that assumption directs the incumbents at the time of the issuance of the said mandate to do that which they may not be in position to do, as members of the said Board, by reason of lapse of time and the expiration of term of office;

12. The court erred in many other matters and things apparent on the face of the record.

Wherefore the respondents and appellants pray that the said cause may be reversed, remanded or dismissed, as may be proper.

E. C. ABBOTT,
District Attorney for the Counties of Santa Fe and Taos.
A. B. RENEHAN,
Attorney for Respondents.

And afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government on the first Wednesday after the first Wednesday in January, A. D., 1906, on the seventeenth day of the said regular term, the same being Friday, January 26th A. D., 1906, the following among other proceedings were had and entered of record, to wit:

33 No. 1123.

TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL., Appellees,
vs.
BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL., Appellants.

Appeal from District Court, Santa Fe County.

It is ordered by the court that this cause, be and the same hereby is set for hearing for the 29th day of January, A. D., 1906.

And afterwards, on to-wit, *on* the nineteenth day of the said Regular term, the same being Monday, January 29th A. D., 1906, the following among other proceedings were had and entered of record, following to wit:

No. 1123.

TERRITORY OF NEW MEXICO *ex Rel.* BIARD S. COLER ET AL., Appellees,
vs.
BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL., Appellants.

Appeal from District Court, Santa Fe County.

This cause having come on to be heard upon the transcript of record, assignment of errors and briefs of counsel, is partly argued by A. B. Renehan, Esq. for appellants and C. A. Spiess, Esq., for appellees, and the argument not being concluded this cause is continued until tomorrow morning at ten o'clock.

A*b*d afterwards, on to wit: *on* the twentieth day of the said Regular term, the same being Tuesday, the 30th day of January, A. D., 1906, the following among other proceedings were had and entered of record, following to wit:

34 No. 1123.

TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL., Appellees,
vs.
BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL., Appellants.

Appeal from District Court, Santa Fe County.

This cause again coming on to be heard, upon the transcript of record, assignment of errors and briefs of counsel, is further argued by E. C. Abbott, Esq. for appellants, and submitted to the Court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January, A. D., 1907, on the twelfth day of the said Regular term, the same being Wednesday the 27th day of February A. D., 1907, the following among other proceedings were had and entered of record, to wit:

No. 1123.

TERRITORY OF NEW MEXICO *ex Rel.* BIARD S. COLER ET AL.,
Appellees,
vs.
THE BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL.,
Appellants.

Appeal from District Court, Santa Fe County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court, upon a former day of the present term, and the court being now sufficiently advised in the premises announces, its decision by Associate Justice Parker, Chief Justice Mills, and Associate Justices Mann and Abbott, concurring, modifying the judgment of the court below and as so modified, affirming the same for reasons stated in the opinion of the Court on file; It is therefore considered and adjudged that the judgment of the District Court in and for the County of Santa Fe, whence this cause came into this court, be so modifies as to sustain the peremptory writ for the levy of *a* ten mills for each year until the interest accruing on the said judgments since the rendition of the said judgment on September 24 1900, is paid, and that as so modified, the judgment of the District Court in and for the County of Santa Fe, whence this cause came into this court is hereby affirmed.

And afterwards, on to wit: *on* the eighth day of March, A. D., 1907, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for a rehearing in the above entitled cause, which said motion for a rehearing was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

No. 1123.

THE TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL., Appellees,

vs.

THE BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL., Appellants.

Appeal from District Court, Santa Fe County.

Motion for Re-hearing.

Now comes the appellants and move the court for a rehearing of said cause, for the reason that questions decisive thereof in favor of the appellants, and duly submitted by counsel have been overlooked by the court as follows, to wit:

1. That the prayer for mandamus in this matter and the writ thereupon issued is for the payment of principal, interest and
36 costs, and therefore cover the same ground as the writ under which the 82 Mill levy was made, so that the court in its opinion herein departs entirely from the nature of the judgment below and attempts to substitute in lieu thereof an original judgment of its own, in mandamus.

2. That the petition upon which this writ was allowed in the lower court did not state facts sufficient to state a cause of action in that it failed to allege demand and failed to allege the value of taxable property in the County of Santa Fe upon which to authorize the trial court to determine a levy of any fixed amount as it sought to do.

3. That the relators had a plain, speedy and adequate remedy at law under the statute which pretended to authorize the bonds and coupons fundamental to this cause.

4. That the motion for a right to be heard should not be construed with the technical accuracy which would be proper if it were a return to an alternative writ, but was based upon the law that where a contest was probable or justifiable a peremptory writ should not issue in the first instance.

5. That under the force of the pretended mandamus of January 25th, 1901, which required the appellants to levy a tax sufficient in amount to produce the sum of $135284.19, with interest thereon from September 24th, 1900, until paid, on February 7th, 1901, the appellants in obedience thereto made a levy of 82 mills on each dollar of the taxable valuation of the property in the County of Santa Fe, in full compliance with the command of the said writ of mandamus.

6. That the failure of the collector to collect the said levies, if in fact he did fail, is to be attributed to the officer and not to the appellants.

7. That if the said sum of $135284.19, saying nothing of interest from September 24th, 1900, was based upon the assessed values of said county, by a matter of calculation it would appear that
37 those assessed values at the time of the said levies were ' 000.00, but there is an entire absence of means to infer what w , the assessed value*d*, as there is no datum from which to infer the amount of interest included in the purposes of the said levies, although it might be assumed that some interest was involved.

8. That if the assessed values be taken as 165000, then a twenty mill levy or two ten mill levies thereon, would produce, $33000.00, instead of $32996.00.

9. That if it be assumed that the said 82-mill levy would produce only the face of the said judgments, which assumption is unwarranted by any facts or record, without any incorporation of interest then the court assumes that the record of the county commissioners and the statements in their motion for leave to answer are untrue, but these are questions of fact to be determined on return or answer, for the record shows that the 82-mill levy is full in compliance with the mandate of the lower court, and that it was made for the purposes of the mandate, which required the levy to be made for the payment of the basic judgment, with interest thereon at 5% from September 24, 1900, until paid, which mandate was obeyed as appears by the order of the appellants found at page 21, of the record in Appeal No. 1122.

10. That the amount of levy required to pay any balance due even on the theory of modification on which the Supreme Court proceeds is not a matter of mathematic*a* or calculation on account of the confusion between the several mandates and the lack of certain factors or rather of certainty of the factors.

11. That there is no pleading, evidence or record, to authorize the modification proposed by this court, but the said modification is necessarily based upon speculative rather than substantial inferences and so of the theory tha*n* the court can apply the mandate to the production of money with which to pay interest since the former mandamus, since that was not the contemplation of the rela-
38 tors seeking a levy in place of the 82-mill levy on the assumption that it had not been paid, and the respondents seeking to defend on the ground that such levy would be cumulative without authority of law.

12. That the writ here in question was for the production of funds with which to pay said judgment and the interest accrued thereon not from September 24th, 1900, for that was covered by the levy of 82 mills of date of February 7th, 1901, so that if the court, is right in transmitting the case made below, the interest to which the modification could apply could be only that which accrued between February 7th, 1901, and August 31st, 1905, the date to which the levy in question here should be referred, which in no event would be -32996 but could be only $30958.43.

13. That there is no question of interest, paid or unpaid, since August 31st, 1905, or to be more accurate, since the date of the filing of the petition herein.

A. B. RENEHAN,
Attorney for Appellants.

And Afterwards, on to wit *on* the Seventeenth day of the Said Regular term, the same being Friday the 30th day of August, A. D., 1907, the following among other proceedings were had and entered of record, following to wit:

No. 1123.

TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL.,
Appellees,
vs.
THE BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY ET AL.,
Appellants.

Appeal from District Court, Santa Fe County.

This cause coming on before the court upon a motion of appellant herein for a rehearing, and the court being sufficiently ad-
39 vised in the premises, denies the same; It is therefore considered and adjudged by the court that the motion of appellant herein for a rehearing be and the same hereby is denied.

And Afterwards, on to wit, on the 25th day of October, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a motion and order of appeal in *a* the above entitled cause, which said motion for appeal and order allowing the same was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

No. 1123.

THE TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL.,
Appellees,
vs.
THE BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY, ET AL.,
Appellants.

Appeal from District Court, Santa Fe County.

Now comes the appellants herein, by A. B. Renehan, Esq. Special attorney for appellants, and R. C. Gortner District Attorney, and pray an appeal to the Supreme Court of the United States of America, from the order and judgment made and entered of record in the above entitled cause, on to-wit, The 27th day of February A. D., 1907.

A. B. RENEHAN,
Special Attorney for Appellants.
R. C. GORTNER,
District Attorney.

This cause coming on to be heard upon the motion of appellants in the above entitled cause by their attorney A. B. Renehan, Esq. for an appeal of this cause to the Supreme Court of the United States of America, from an order and decision of this court, made
40 and entered of record on the 27th day of February A. D. 1907, It is hereby ordered by the court that the said motion of appellants, be and the same hereby is granted and allowed.

WILLIAM J. MILLS,
Chief Justice Supreme Court of the Territory of New Mexico.

October 24th, 1907.

And afterwards, on to wit, in Vacation on the 25th day of October A. D., 1907, there was entered of record the following order allowing an appeal in the above entitled cause which said order allowing an appeal was and is in words and figures following to wit:

No. 1123.

TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER ET AL., Appellees,
vs.
THE BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY, ET AL., Appellants.

Appeal from District Court, Santa Fe County.

This cause coming on to be heard upon the motion of appellants in the above entitled cause by their attorney A. B. Renehan, Esq., for an appeal of this cause to the Supreme Court of the United States of America, from an order and decision of this court, made and entered of record on the 27th day of February A. D., 1907. It is hereby ordered by the court that the said motion of appellants, be and the same is hereby granted and allowed.

WILLIAM J. MILLS,
Chief Justice Supreme Court, Territory of New Mexico.

October 24th, 1907.

And afterwards, on to-wit on the 27th day of February A. D., 1907, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an opinion by the *the* court
41 in the above entitled cause, which said opinion by the court was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

No. 1123.

TERRITORY OF NEW MEXICO *ex Rel.* BIRD S. COLER and E. T. CHAPMAN, Petitioners, Appellees,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE, Respondents, Appellant.

Appeal from District Court, Santa Fe County.

Opinion of the Court.

PARKER, *J.:*

On September 24, A. D., 1900, relators recovered judgment against appellant in two separate actions upon interest coupons past due and unpaid upon certain outstanding bonds of appellant and in the sum of $60,926.02 and $74,358.17, respectively. In and by said judgments it was ordered by the Court that the appellant levy upon all of the taxable property in said county a special tax sufficient to raise the amount of said judgments, together with interest thereon until paid, and together with costs. On February 7, 1901, the appellant levied on all the taxable property of the county a special tax for the payment of said judgments, interest and costs at the rate of eighty-two mills on the dollar and determined that this rate of levy was necessary to produce the aggregate amount of such judgments, interest and costs. Appellant has paid no portion of said judgments. On August 22nd, 1905, a petition for a peremptory writ of mandamus was filed in the Court below by appellees to compel appellant to levy a special tax of ten mills upon each dollar's — of all taxable property in the county to be applied to the payment of each of said judgments. The Court without hearing awarded a peremp-
42 tory mandamus as prayed. Thereafter appellant on August 26, 1905, filed in said causes a petition alleging; that at the date of the rendition of said judgments, on September 24, 1900, all of the property subject to taxation within the then county of Santa Fe was subject to the payment of its pro-rata of said judgments; that the Thirty-fifth Legislative Assembly of New Mexico segregated a portion of Santa Fe County and attached same to the County of Rio Arriba and another portion of said County and attached the same to the County of Torrance; that all of said portions so segregated were still liable and subject to their proportion of said indebtedness; that said peremptory mandamus included only the property within the present boundaries of Santa Fe County and not the portions theretofore segregated; reciting the former mandatory order of the Court upon appellant and the compliance therewith; that said former levy was still existing and a lien upon taxable property of the county; that said former levy was ample and sufficient to cover the amount of said judgments; that said two ten mills

levies were for the payment of the same obligation as the said former eighty-two mills levy and was largely in excess of the amount required to pay the said judgments, interest and costs; that appellant was entitled to be heard as to the amount of levy necessary and whether any levy was necessary; that said former levy of eighty-two mills was sufficient to pay said judgments.

Appellant further alleged that the act of Congress whereby the bonds, the coupons whereof were the subject of the said actions, were validated is indefinite, uncertain and incapable of a reasonable interpretation and enforcement so as to be applied to any bonds issued by the County of Santa Fe, and does not sufficiently identify any bonds of said county intended to be validated. Appellant prayed that the peremptory mandamus in said action be suspended and that appellant be permitted to show cause and to be heard before said order and writ be made permanent. The petition was denied and appellant brings the cause here for review.

43 It is conceded by appellees that if the former levy of eighty-two mills is sufficient to pay the said judgments, interest and costs, that the present writs were improvidently issued. But it is contended that the record in this case itself shows, notwithstanding the allegations of the appellant, that such is not the fact. It is to be observed that the appellant in its former levy of eighty-two mills on the dollar determined that this was simply sufficient to pay the then amount of the judgments, together with the interest until paid, and costs. No attempt was made at that time to make a levy to pay any greater sum than the amount then due. The resolution of the Board of County Commissioners shows upon its face this fact. Since that time the judgments have born- interest and at the date of the issuance of the peremptory writs in this cause they had amounted to the sum of $32,874.05, in excess of the amount then due. The claim, therefore, of appellant that the eighty-two mills levy was sufficient to pay the amount of the judgments at the date of the issuance of the peremptory writs is unfounded and untrue in fact.

The allegation, however, that the two ten mills levies are excessive is based upon the different proposition. The amount of interest accumulated upon the said judgments since the date of the former eighty-two mills levy is the sum of $32874.05. If the two ten mills levies will produce more money than is required to pay this sum then they ought not to have been commanded by the writs. But it nowhere appears in the record that any increase had been made in the assessed valuation of the property of Santa Fe County and, on the other hand, it is alleged by appellant that portions of the county have been cut off by the legislature since the levy of the eighty-two mills. It is fair to presume, therefore, in the absence of any showing to the contrary, that the assessed valuation of the county is not in excess of what it was in 1901, when the eighty-two mills levy was made. If this is so, a twenty mills levy will produce, if collected in full, $32,996., an excess only of $121/95 over and above the

44 amount required to pay the interest on the judgments accumulated since the date of their rendition, and up to the date of the issuance of the peremptory writs in this case. Nearly $10,-

000.00 in interest has accrued on the said judgments since that time. It, therefore, appears that the levy of the twenty mills commanded by the writs in this case is not excessive, the allegations of appellants to the contrary, notwithstanding.

It is urged that the peremptory writs demand a continuing levy of twenty mills from year to year until the entire judgments, principal, interest and costs are paid, and that the court consequently exceeded its authority. This position we are inclined to think correct but the judgment below will in this particular be modified so as to avoid the objection.

It is urged that the action of the Court is erroneous for the reason that the two precincts mentioned as having been segregated from the County of Santa Fe and attached to other counties should have been included in the peremptory writs and tax levy. This contention has no merit. By Chapter 20 of the Session Laws of 1903, it is provided that any portion of a county, owing a bonded debt which shall be segregated, shall not be released from its obligation to contribute its just proportion to the payment of such debt. But it is provided therein the assessment, levy and collection of such proportion shall be upon the order of the old county by the officers of the new county and that the money collected shall be paid into the treasury of the old county. The County of Santa Fe, therefore, has it within its power to compel contribution from the two other counties, which have received a portion of its territory, in proportion to the amount of taxable property received, and this is the method provided by law.

It is further urged that the Act of Congress validating the bonds in question is so indefinite and uncertain as that the question of their validity is open and that the same may be inquired into in this proceeding. This proposition is palpably untenable. The pro-
45 cess of mandamus is simply in aid of the judgments and is in the nature of an execution for the enforcement thereof. Any attack upon the judgment in this proceeding would be a collateral attack which is not allowable, the only remedy being by direct attack by way of appeal, and this right had been lost by lapse of time. The only error of the court below is in awarding a continuing mandamus for the payment of the entire amount of the judgments, interest and costs, and in this respect the same will be modified so as to sustain the peremptory writs for the levy of the two ten mills levies for each year until the interest accruing on the said judgments since the rendition of the judgments on September 24th, 1900, is paid, and, as so modified, the judgments of the court below will be affirmed, and it is so ordered.

FRANK W. PARKER,
Associate Justice.

We concur:
WILLIAM J. MILLS, *C. J.*
EDWARD A. MANN, *A. J.*
IRA A. ABBOTT, *A. J.*

Associate Justice McFie, having tried the case below, did not participate in this decision.

Associate Justice Pope did not participate in this decision.

46 TERRITORY OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the foregoing fourty five pages contain a full true and perfect copy of the record and proceedings, pleadings and opinion filed in a certain cause lately pending in the Supreme Court of the Territory of New Mexico—entitled The Territory of New Mexico, Bird S. Coler *et al.* appellees *vs.* The Board of County Commissioners of Santa Fe County, Appellants which is hereby transmitted to the Supreme Court of the United States in accordance with an appeal herein taken October 24th A. D. 1907.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 26th day of October, A. D. 1907.

[Seal Supreme Court Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

47 THE UNITED STATES OF AMERICA:

To The Territory of New Mexico *ex. Rel.* Bird S. Coler and E. T. Chapman, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, within sixty days from the date hereof, pursuant to an appeal taken from the Supreme Court of the Territory of New Mexico, in a certain cause therein pending, and Numbered 1123, wherein the Board of County Commissioners of Santa Fe County, *et al.*, were appellants and you were appellees, to show cause if any there be, why the judgment rendered against the said appellants, as — the said appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States, and the seal of the Supreme court of the Territory of New Mexico this the 24: day of October, A. D. 1907.

[Seal Supreme Court Territory of New Mexico.]

WILLIAM J. MILLS,
Chief Justice Supreme Court of the Territory of New Mexico.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

I, Charles A. Spiess, Attorney of record in the Supreme Court of the Territory of New Mexico of the Appellees to the within citation, in said causes in said court, hereby acknowledge service upon me for said Appellees, as their attorney of record as aforesaid of the within citation, this 16th day of December, 1907.

CHARLES A. SPIESS,
Attorney for Appellees, Las Vegas, N. M.

48 In the Supreme Court of the United States, October Term, 1907.

No. 544. No. 1123, S. C. N. Mex.

TERRITORY OF NEW MEXICO, *ex Rel.* BIRD S. COLER ET AL., Appellees,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE, Appellant.

Assignments of Error.

Now comes the appellant, The Board of County Commissioners of the County of Santa Fe, by T. B. Catron, Esq., its attorney, and says that the Supreme Court of New Mexico, in the said cause, erred, in the following respects, that is to say:

1. In affirming the judgment of the District Court of the First Judicial District of the Territory of New Mexico, for the County of Santa Fe, because the said judgment was contrary to the law and the facts, and unauthorized by any pleading or proof, and particularly for the reasons hereinafter stated.

2. There was no proof or admission before the district court upon which to determine the amount of levy to be ordered, if any, and no fact or facts upon which to found a judicial deduction in this regard.

3. The relators' petition did not state the taxable values of the said County of Santa Fe and there was no proof on the subject, and there was no other legal means before the court to enable it to determine a requisite levy.

4. The action of the said district court in requiring a levy of ten mills to be made was arbitrary and improvident, there having been no foundation laid, in pleading or proof, to that end.

5. The Supreme Court of New Mexico in affirming the judgment of the said District Court departed, without warrant of law, from the theory of the relators' petition, and from the theory of the judgment of the said District Court, in this that those theories were that no provision had been made for the payment of the fundamental judgments, with their interest and costs, whereas such provision

49 had been made by an ample levy on February 7th, 1901, which was ignored in the said petition and which was not shown to have been exhausted, and that the relators were entitled to a levy for all, if any, of their judgment, with interest and costs, while the Supreme Court of New Mexico, assuming that some interest was due, restricted the judgment and writ of mandamus to the levy of taxes for the payment of such interest.

6. The Supreme Court of New Mexico erroneously assumed and deduced that the taxable values of the County of Santa Fe on the 22nd of August, 1905, when the levy herein complained of was ordered, were substantially $1649,806,00, because such valuation,

under a levy of 82 mills, would produce substantially $135,284.19, on February 7th, 1901.

7. The Supreme Court of New Mexico erroneously interpreted the appellant's resolution of February 7th, 1901, as meaning that a levy of 82 mills on the dollar, on said day, would produce only $138,284.19, the principal of the judgment here involved and the judgment involved in Cause No. 543 on the docket of this court, taken together; whereas, the purpose and effect of the said resolution were to make a levy sufficient to pay the sum of $135,284.19, with interest *until paid*, and costs, pursuant to the writ of mandamus of January 25th, 1901.

8. There was no showing in the said District Court that the said levy of 82 mills for the purpose of compelling payment of the fundamental judgment herein and the fundamental judgment in said Cause No. 543 was insufficient to meet the principal and the interest *until paid*.

9. The judgment of the Supreme Court of New Mexico is in effect an original writ of mandamus or, in effect, authorizes an original writ of mandamus, without authority of law.

50 10. The Supreme Court of New Mexico erred in sustaining the action of the said District Court in granting a peremptory writ of mandamus, in the first instance, without a hearing or opportunity for hearing given the respondent board, there being matter of fact to be adjudged, for instance, the taxable valuation of the County of Santa Fe at the time, the amount of levy proper and just, if any there should be, the status of the levy of February 7th, 1901, and the amount of money, if any, produced thereby, the amount of money which said last mentioned levy could, should and would produce, and other matters of fact apparent.

11. The Supreme Court of New Mexico should not have held that the motion of the respondent board, in the district court, for an opportunity to be heard, supplied any lack of fact or jurisdiction which existed in the proceedings up to the time of the filing of said motion.

12. The petition of the relators in the said District Court did not state facts sufficient to constitute a cause of action against the respondent thereto.

13. The Supreme Court of New Mexico erred in holding that the bonds behind the judgment in question were valid and enforcible.

14. The Supreme Court of New Mexico erred in holding, without looking behind the judgment herein, in effect, that the act of alleged validation of the said bonds was intelligible, operative and enforcible.

15. The Supreme Court of New Mexico should have reversed the judgment of the said District Court and remanded said cause for hearing on the merits, so that, among other things, it might be seen whether the said judgment rested upon valid and enforcible obligations.

16. The said District Court was without authority or jurisdiction to issue or grant said writ of mandamus, here in question, because there existed a plain, speedy and adequate remedy under the statute, Secs. 340 *et seq.*, Compiled Laws of New Mexico

of 1897, if the identity of the bonds validated be established, and because no demand of performance is shown to have been made, and because no duty required by law rested upon the re-
51 spondent to make the levy here in question, the said levy of 82 mills outstanding, and for other reasons hereinbefore shown.

17. The said District Court erred in overruling the respondent's motion and petition to be granted an opportunity to answer and be heard, and the Supreme Court of New Mexico erred in sustaining such ruling of the said District Court, and all the ground in said motion set forth are herein and hereby adopted, and they are hereby referred to and made a part hereof.

For all of which reasons, the said cause should be reversed and remanded with instructions that the Supreme Court of New Mexico require the said District Court to dismiss the same.

T. B. CATRON,
Attorney for Appellant.

52 [Endorsed:] No. 544. Supreme Court of the U. S. No 1123. Supreme Court of N. Mex. Territory of New Mexico *ex rel.* Bird S. Coler *et al. vs.* Board of County Commissioners of Santa Fe County. Assignments of Error. T. B. Catron, Att'y for appellant. Office of the clerk. Received Jan. 9, 1908. Supreme Court U. S.

53 [Endorsed:] File No. 20,947. Supreme Court U. S., October Term, 1907. Term No. 544. The Board of County Commissioners of Santa Fe County *et al.*, App'ts, *vs.* The Territory of New Mexico *ex rel.* Bird S. Coler *et al.* Assignment of Errors. Filed Jan'y 9th, 1908.

Endorsed on cover: File No. 20,947. New Mexico Territory, supreme court. Term No. 230. The Board of County Commissioners of Santa Fe County *et al.*, appellants, *vs.* The Territory of New Mexico *ex Rel.* Bird S. Coler and E. T. Chapman. Filed December 23d, 1907. File No. 20,947.

Nos. 42 and 43.

APPELLANTS' REPLY BRIEF.

Supreme Court of the United States.

OCTOBER TERM, 1908.

Office Supreme Court, U. S.
FILED.
DEC 8 1909
JAMES H. McKENNEY,
CLERK.

~~Nos. 229 and 230.~~

THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY ET AL., APPELLANTS,

vs.

THE TERRITORY OF NEW MEXICO *EX REL.* BIRD S. COLER AND E. T. CHAPMAN.

APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

Supreme Court of the United States.

OCTOBER TERM, 1908.

Nos. 229 and 230.

THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY ET AL., APPELLANTS,

vs.

THE TERRITORY OF NEW MEXICO *EX REL.* BIRD S. COLER AND E. T. CHAPMAN. APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

The propositions preferred by the appellees are each of them immaterial, and have no relation to the principles underlying the appeal, as will be shown more specifically under separate headings.

I.

There could be no findings of fact and none are required.

The court below decided this case upon petition. There was no evidence offered and hence there could be no findings of fact. The statute does not demand them in much cases, or, in other words, it does not demand the impracticable or impossible. There was

only tried an issue of law. Hence, Armijo vs. Armijo, 181 U. S. 558, is not in point.

Sec. 2, 18 Stats. 27; 4 Fed Stats. Ann. 460.

That which has been certified to this court is the record proper, the record upon which the court below proceeded.

The governing rules, under the laws of the Territory of New Mexico, are found in Ch. 57, Laws of 1897, from which the following material portions are excerpted:

> Sec. 22. *The Record Proper.*—All entries, orders and rulings of record in the clerk's office and all papers regularly filed in a cause with the clerk of the district court shall be construed a part of the record proper. * * * * * *
>
> Sec. 24. *When testimony is part of record without bill of exceptions.*—In all cases tried without a jury the testimony taken before a court or that taken by a referee, the transcribed notes of the stenographer in such cases, properly certified by the court or the referee, and all motions, orders or decisions made or entered in the progress of the trial of any such action shall become and be a part of the record for the purpose of having the cause reviewed by the supreme court upon appeal or writ of error, without any bill of exceptions.

II.

Mandamus to collect these judgments is wrong.

There is no contention made that mandamus is not the proper remedy in a proper case, but it is claimed that mandamus, whether peremptory or alternative, is wrong in this instance, for the several reasons given in the original brief, and particularly for the following reasons there stated: (1) That there is a remedy afforded by the statute itself which created the right, if right there be, and (2) That the act of validation is indefinite and uncertain, and therefore not enforcible.

III.

The rule of res judicata is not pertinent.

The real question is: Can a levy be lawfully ordered to pay a judgment upon a claim where there is no authority to levy a tax to pay the claim? The Supreme Court of New Mexico answered that question in Railway Co. vs. Territory, 72 Pac. 14, saying, *inter alia:* "It must be understood that plaintiffs in error do not attack the judgments of defendant in error, but only the means of enforcing payment of them. So it is not a collateral attack nor any other attack upon the judgments. We are of the opinion that plaintiffs in error can inquire into the cause of action upon which the judgments were rendered, and, if it is found that the indebtedness for which said judgments were rendered was for current expenses of said county, then no levy could have been made by the county commissioners for the payments of said judgments, except such as is provided in the 2½ mills regular levy" * * * *

In United States vs. County of Macon, 99 U. S. 591, the same rule is applied thus: "We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand and of the amount thus due, but it gives him no new rights in respect to the means of payment."

See the cases on this subject cited in Railway Co. vs. Territory, *supra.*

In Brownsville vs. Loague, 129 U. S. 502, it was contended (p. 502) that: "The coupons, having passed into judgments, not only is all inquiry into their validity precluded, but also any denial of the power to tax to pay them .....;" the court rejoining: "The power invoked is not the power to tax to pay judg-

ments, but the power to tax to pay bonds, considered as distinct and independent, and therefore, when the relator is obliged to go behind his judgments as money judgments merely, to obtain the remedy pertaining to the bonds, the court cannot decline to take cognizance of the fact that the bonds are utterly void and that no such remedy exists. *Res judicata* may render straight that which is crooked, and black that which is white, ... but where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever."

Respectfully submitted.

A. B. RENEHAN,
Attorney for Appellants.

Supreme Court, U. S.
FILED.
NOV 1 1909
JAMES H. McKENNEY,
Clerk

APPELLANT'S BRIEF.

Supreme Court of the United States.

OCTOBER TERM, 1908.

Nos. 42 & 43.

[redacted]

THE BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY ET AL., APPELLANTS,

vs.

THE TERRITORY OF NEW MEXICO *EX REL.* BIRD S. COLER AND E. T. CHAPMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED DECEMBER 23, 1907.

(20,946.)

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 229 and 230

The Board of County Commissioners of the County of Santa Fe, Respondents, Appellants,		
vs.	}	Appeal from the District Court Santa Fe Co.
Territory of New Mexico, ex rel., Bird S. Coler and E. T. Chapman, Petitioners Apellees,		

The petitioners represent by their petitions which were filed in the lower court on the 22d of August, 1905, that, on the 24th of September, 1900, they recovered judgments in the District Court of the First Judicial District for the County of Santa Fe, against the respondents in the sum of $60,926.02 and $74,358.17 in cases 1122 and 1123 respectively, on account of past due coupons from certain bonds; that, among other things, the said judgments required the respondents immediately to cause the said sums and the interest thereon due and to become due, to be assessed and levied upon and out of the taxable property situate in the said County of Santa Fe and to cause the same to be collected in the manner provided by law; that no part of said judgments, nor of the interest thereon, has ever been paid, and, upon information and belief, that the respondents have wholly failed to collect any sum whatsoever from taxes or otherwise for the payment of said

judgments; that there is no money on hand applicable to said payment and that there is due upon said judgments the sums respectively of $75,974.72 and $92,724.63; that it was the duty of the respondents to make a levy of taxes and to order the collection thereof for the payment of the said judgments, interest and costs; that the respondents have failed and refused and still fail and refuse to make any levy whatsoever for the said purposes for the year 1905, and that the petitioners, or relators, are beneficially interested in the said judgments as judgment creditors and the present holders of the said judgments, and are without plain, speedy and adequate remedy in the ordinary course of law. They pray for a peremptory writ of mandamus in due form commanding the respondents to convene in special session as the Board of County Commissioners, and to make such levy of taxes upon all property within the limits of the said County in the sum of *ten mills on each dollar thereof for the purpose of paying a portion of the judgments aforesaid, respectively, with interest and costs, and that in each and every year thereafter until the said judgments, interest and costs be fully paid, they shall, at the time of making the levy of taxes for other purposes, levy a special tax in the sum of ten mills on each dollar of taxable property within the limits of said County, etc.* Forthwith, that is to say, on the 22d of August, 1905, upon the said petition a peremptory writ of mandamus was ordered and issued in each case, following to a nicety the prayer of the petition, without hearing, and without opportunity to the respondents to be heard. This writ was immediately served.

On the 26th of August, 1905, the respondents filed the motion, which will be found beginning on page— of the respective printed record, wherein certain defences were set up as against the writ of mandamus demanded and issued, briefly as follows: that if the judgment be good, it affected the precinct of Espanola and the precinct of Moriarty, eliminated from Santa Fe County, since the date of rendition of the said judgment of September 24, 1900, and the mandamus proceeding should have involved the County of Rio Arriba, as to the said precinct of Espanola, and the County of Torrance, as to the said precinct of Moriarty, for which reasons the amount of levy ordained was not based upon all the taxable property,

which, if the said original judgment is good, should have borne its proportion of the levy; that upon the same original judgment, on the 25th of January, 1901, the said District Court issued a peremptory writ of mandamus to the Board of County Commissioners of the County of Santa Fe, requiring the levy of a tax upon the taxable property of the said County, sufficient in amount to produce the sum of $135,284.19, with interest from the 24th of September, 1900, with costs of suit, in respect to which the said Board on the 7th of February, 1901, made a levy of eighty-two mills on each dollar of the taxable property of the said County of Santa Fe, which stands upon the tax rolls of the said County at the present time, and, if the said original judgment is valid, is sufficient to make the damages claimed and allowed; that the said levy of ten mills is excessive; that the levy of ten mills for succeeding years is illegal, unauthorized, unjust and unnecessary; that the respondents should have been heard or been given an opportunity to be heard as to the amount of levy required, or as to whether any levy at all should be ordered, for the purposes set forth in the petition; that the levy of the tax ordered by the writs of mandamus in these cases is not an act specially enjoined by law as a duty resulting from the office, trust or situation, under the circumstances of this suit; that it is not the duty of the respondents to collect in their levies; that the relators have a plain, speedy and adequate remedy in the ordinary course of law. Further allegations of defense are the following found at pages 19 and 20 of the printed record:

For a further and additional ground of motion, the respondents say: (a) That the act of congress whereby the bonds in question are pretended to have been validated, approved and confirmed, is indefinite, uncertain and incapable of reasonable interpretation and inforcement so as to be applied to any bonds issued by the County of Santa Fe. (b) That the said act of congress does not sufficiently indentify any bonds of the said county so as apprise the Board of County Commissioners of the said county of the bonds intended to be validated, approved and confirmed. (c) That no bonds of the said county, in the amount of $172,500.00, dated March 1st, 1902, issued under the provisions of an act of the territorial general

assembly, known as the refunding act, in refunding and in lieu of $150,000,00 of bonds and overdue interest thereon, of said County of Santa Fe, theretofore issued and outstanding, were ever issued by the said County of Santa Fe, but bearing said date, under the provisions of an act of the Territorial General Assembly, not known as the refunding act, in refunding and in lieu of one hundred and fifty thousand dollars of bonds, and the overdue interest thereon of the said county, issued and outstanding, there were issued bonds of the said county in an amount far in excess of the said sum of $172,500.00, and it can not be understood from the said act whether all of such issues have been validated by the said act of congress, or whether only an amount thereof not exceeding, $172,500.00, and if no more than $172,500.00 in amount, which of said bonds are validated. (d) That the said bonds so pretended to have been validated are the subjects of different ownership and are not all in the hands of any one person, but in the hands of divers persons, and it cannot be determined from the said act of congress what holder of said bonds in excess of the amount named in the said act of congress shall not have the benefits of validation. (e) That the total amount of bonds by the said County of Santa Fe, issued as aforesaid in excess of $172,500.00 is not less than $200,000.00, under the said act. (f) That at the time of the passage of the said act of congress and its becoming a law by limitation, there was more than one act called and known as "refunding act" in force in the Territory of New Mexico, by enactment of its Legislative Assembly, but what refunding act is referred to by the said act of congress is not disclosed.

On appeal, the Supreme Court of New Mexico, heard both cases together as Nos. 1122 an d1123 and they are in this court as Nos. 229 and 230. It modified the judgment of the lower court so that the direct continuing levy of ten mills in each case was reduced to two mills in each case. Thus modified the judgment below was affirmed.

Into the record of the appellant's motion to suspend the writ of mandamus issued and to permit them to answer there has crept and been maintained an error, under the sub-heading "c," in which the word "not" should be incorporated before the words "known as the refunding act, in refunding and in lieu, etc." The act in question is

Chap. 79, L. 1891. It is introduced in the Compiled Laws of 1897, at page 186, thus: " Funding Act of 1891, for counties and municipalities." The true title is: "An Act for the financial relief of counties and municipalities."

In the Supreme Court of New Mexico, the errors assigned in cases Noos. 1122 and 1123 then, Nos. 229 and 230 here were:

Now come the respondents and appellants by E. C. Abbott, District Attorney for the Counties of Santa Fe and Taos, and A. B. Renehan, their attorneys, and assign the following as errors committed by the court below in the trial of the cause to-wit:

1. That the judgment, allowance and issuance of the peremptory writ of mandamus herein was unauthorized in law.

2. That the court erred in issuing a peremptory mandamus in the first place without a hearing or opportunity for hearing given to the respondents.

3. That the court erred in denying the motion of the respondents to suspend the peremptory order herein and to permit them to show cause and to be heard before the said order and writ should be made permanent, and because the grounds of the said motion and each of them, constituted a lawful and meritorious defense to the said proceeding, to the petition and to the writ issued.

4. That the court erred in holding that the bonds in question were legal and enforcible.

5. That the court erred in holding in effect that the act of alleged validation of the said bonds was intelligible, operative and enforcible.

6. That the court erred in denying the said motion for a hearing because the respondents had in law a right to require that the Counties of Rio Arriba and Torrance should be proceeded against in the same action.

7. That the court erred in denying the said motion of the respondents for a hearing, because they had a right in law to be heard in respect to the existing levy of February 7, 1901, for the same purpose as that sought in this proceeding, which constituted, if valid, a lien upon all the property within the said County of Santa Fe and upon which the levy sought in this proceeding would be cumulative without right in law, and without the elimination of the prior levy.

8. That the court erred in denying the motion of the respondents for a hearing, because they were entitled to be heard at least as to the amount of the levy which the court would make in said proceeding, if any, the same resting upon matter of fact essential to be proven:

9. That the court erred in so framing the said writ of mandamus as to cover successive years because the amount of levy, if any, which might be required in one year rather than another would depend upon circumstances and the valuation of property as it might be found by the assessing boards, and because the court in effect anticipated a refusal on the part of the respondents in subsequent years to make a levy for the matters in question in this proceeding, without any authority in law or fact for such anticipation, and without any authority in law to extend the levy beyond the current fiscal year;

10. The court erred in denying the motion of the respondents for a hearing because of the grounds thereof set up in the eighth paragraph of the said motion, taken jointly and severally, the same constituting meritorious and substantial defenses to the cause of action set up by the petitioners;

11. The court erred in the issuance of the said mandamus so as to cover future years, in this, that it assumes that the personnel of the Board of County Commissioners of the said County would continue unchanged, and on that assumption directs the incumbents at the time of the issuance of the said mandate to do that which they may not be in position to do, and in natural course will not be in position to do, as members of the said board, by reason of lapse of time and the expiration of term of office;

12. The court erred in many other matters and things apparent on the face of the record.

Wherefore, the respondents and appellants pray that the said cause may be reversed, remanded or dismissed, as may be proper.

In this court, the assignments of errors are:

Now comes the appellant, The Board of County Commissioners of the County of Santa Fe, by T. B. Catron, Esq., its attorney, and says that the Supreme Court of New Mexico, in the said cause, erred, in the following respects, that is to say:

1. In affirming the judgment of the District Court of the First Judicial District of the Territory of New Mexico, for the County of Santa Fe, because the said judgment was contrary to the law and the facts, and unauthorized by any pleading or proof, and particularly for the reasons hereinafter stated.

2. There was no proof or admission before the district court upon which to determine the amount of levy to be ordered, if any, and no fact or facts upon which to found a judicial deduction in this regard.

3. The relators' petition did not state the taxable values of the said County of Santa Fe and there was no proof on the subject, and there was no other legal means before the court to enable it to determine a requisite levy.

4. The action of the district court in requiring a levy of two mills to be made was arbitrary and improvident, there having been no foundation laid, in pleading or proof, to that end.

5. The Supreme Court of New Mexico in affirming the judgment of the District Court departed, without warrant of law, from the theory of the relators' petition, and from the theory of the judgment of the District Court in this that those theories were that no provision had been made for the payment of the fundamental judgments, with their interest and costs, whereas such provision had been made by an ample levy on February 7, 1901, which was ignored in the said petition and which was not shown to have been exhausted, and that the relators were entitled to a levy for all, if any, of their judgment, with interest and costs, while the Supreme Court of New Mexico, assuming that some interest was due, restricted the judgment and writ of mandamus to the levy of taxes for the payment of such interest.

6. The Supreme Court of New Mexico erroneously assumed and deduced that the taxable values of the County of Santa Fe on the 22nd of August, 1905, when the levy herein complained of was ordered, were substantially $10,649,806.00, because such valuation under a levy of 82 mills, would produce substantially $135,283.19, on February 7th, 1901.

7. The Supreme Court of New Mexico erroneously interpreted the appellant's resolution of February 7th, 1901, as meaning that a levy of 82 mills, on said day,

would produce only $135,284.19, the principal of the judgment here involved and the judgment involved in Cause No. 544 on the docket of this court, taken together; whereas, the purpose and effect of the said resolution were to make a levy sufficient to pay the sum of $135,284.19, with interest *until paid*, and costs, pursuant to the writ of mandamus of January 25th, 1901.

8. There was no showing in the said District Court that the said levy of 82 mills for the purpose of compelling payment of the fundamental judgment herein and the fundamental judgment in said Cause No. 544 was insufficient to meet the principal and the interest, *until paid*.

9. The judgment of the Supreme Court of New Mexico is in effect an original writ of mandamus or, in effect, authorizes an original writ of mandamus, without authority of law.

10. The Supreme Court of New Mexico erred in sustaining the action of the said District Court in granting a peremptory writ of mandamus, in the first instance, without a hearing or opportunity for hearing given the respondent board, there being matter of fact to be adjudged, for instance, the taxable valuation of the County of Santa Fe at the time, the amount of levy proper and just, if any there should be, the status of the levy of February 7th, 1901, and the amount of money, if any, produced thereby, the amount of money which said last mentioned levy could, should and would produce, and other matters of fact apparent.

11. The Supreme Court of New Mexico should not have held that the motion of the respondent, in the district court, for an opportunity to be heard, supplied any lack of fact or jurisdiction which existed in the proceedings up to the time of the filing of said motion.

12. The petition of the relators in the said District Court did not state facts sufficient to constitute a cause of action against the respondent thereto.

13. The Supreme Court of New Mexico erred in holding that the bonds behind the judgment in question herein were valid and enforcible.

14. The Supreme Court of New Mexico erred in holding, without looking behind the judgments herein, in effect, that the act of alleged validation of the said bonds was intelligible, operative and enforcible.

15. The Supreme Court of New Mexico should have reversed the judgment of the said District Court and remanded said cause for hearing on the merits, so that, among other things, it might be seen whether the said judgments rested upon valid and enforcible obligations.

16. The said District Court was without authority or jurisdiction to issue or grant said writ of mandamus, here in question, because there existed a plain, speedy and adequate remedy under the statute, Secs. 340 *et seq.*, Compiled Laws of New Mexico of 1897, if the identity of the bonds validated be established, and because no demand of performance is shown to have been made, and because no duty required by law rested upon the respondent to make the levy here in question, the said levy of 82 mills outstanding.

17. The said District Court erred in overruling the respondent's motion and petition to be granted an opportunity to answer and be heard, and the Supreme Court of New Mexico erred in sustaining such ruling of the said District Court, and all the grounds therein stated are herein and hereby adopted, and they are hereby referred to and made a part hereof.

For all of which reasons, the said cause should be reversed and remanded with instructions that the Supreme Court of New Mexico require the said District Court to dismiss the same.

BRIEF AND ARGUMEMNT.

I.

The Peremptory Writ of Mandamus Should Not Have Been Issued Without a Hearing, or at Least Without Any Opportunity to the Respondents to Be Heard.

Many reasons justify this postulate. The amount of the levy is one which depended on many circumstances, not presented upon the face of the petition, such as the value of the taxable property of the County of Santa Fe. Of this the court had no proof and could have no judicial knowledge. Consequently whether two mills or one mill should have been levied was a question of official judgment and discretion, which, at least, in the first in-

stance, the court should not have attempted to control. While a peremptory writ will issue, under given conditions, to compel the specific performance of duties imposed by law upon public officers, it will not lie in any matter requiring the exercise of official judgment and discretion. It will be used to set the official in motion, where his discretion and judgment are required and force him to exercise his function according to some discretion when he has refused to act at all.

2 Spelling, Ex. Rem., secs. 1432, 1433, 1434, 1437.

But here the court has not only attempted to set the respondent in motion, but has sought to give that motion a particular direction. The size of the requisite levy is primarily controlled by two factors, the sum of money to be raised, and the taxable values which shall produce it. The petition gave the court no information of the latter factor, and even if it did an issuable fact would thus be alleged. The court will not take judicial notice of assessment rolls.

For instance, the purpose of the petitions was to compel the raising of an amount of taxes from the taxpayers of the county to pay off $75,974.27 in one case and in the other $92,724.63. The prayer asks for a ten mill levy to discharge a portion thereof. This mode of rogation is in itself unusual. Why a splitting up of the demand should be allowed is not conceivable as a law question. But if the taxable values of the county are large enough, such a levy would produce an excessive revenue. It is unnecessary to speculate upon or guess at the present wealth of the county. It is not before the court as a concrete question except argumentatively. In order to command the levy of two mills the court, without evidence and without judicial knowledge, must have assumed a fact not pleaded or proven in order to supply the defect, that is, that such a levy was merely adequate.

The writ of mandamus is confined to the requirement of official duties of a ministerial character.

2 Spelling, Ex. Rem., sec. 1437.

The duty of the board of county commissioners to levy

a tax for the purpose in view in this suit, if it were a duty at all, is ministerial only so far as the law requires the making of the levy, but beyond this, judicial inquiry and determination and the exercise of official judgment is essential.

While no pleading shows it directly and plainly, the motion of the respondent in the record assumes, and it would seem to be proper in a case of this kind to state openly that the judgments to enforce which the writ was asked rest upon the so-called Santa Fe county railroad aid bonds. That being so, the duty of the respondents is fixed by Sec. 343 of the Compiled Laws of 1847, which says that they shall make "due and sufficient provision for the payment of the interest semi-annually accruing on all bonds issued under this act * * * in each and every year, but "in case of failure on the part of any officer or authorities legally and adequately to assess property and levy and collect taxes for the payment of such interest, or to perform any duty hereby enjoined * * * * the district court either in term time or in vacation shall nominate and authorize some person or persons to discharge such neglected or unperformed duties." Due and sufficient provision of a fund for the said purpose requires and calls for official judgment. If, however, the officer does not act accordingly, then the end aimed at is reached by the displacing of the offending officer and the substitution of one more subservient. It may be said that the present argument is unauthorized by anything appearing of record, and this would be true if full opportunity for pleading was given in the court below, which it was not. Still the court's attention was directed by reference to cases Nos. 4091 and 4092 on the civil docket of the District Court for Santa Fe County, from which the necessary information can be gained to support the contention, if need be, by order of the court to send up original papers. It is true that the motion for a hearing in itself lacks the precision and detail proper to an answer to an alternative writ, but it offers abundant allegation to show the respondent's right to present its side of the controversy in spite of the imperfection with which hurry afflicted it.

On the other hand the petition does not set forth facts sufficient to constitute a cause of action, in this, that it does not show a demand on the board, and its refusal, to

make the desired levy, nor a posture of affairs which would render the demand nugatory and therefore unnecessary in law; and, in this, that for all that the petition contains, it does not appear that the judgments and each of them are not such as should be satisfied out of the current income of the county, or that the special levy ordered by the mandate is not one for a prohibited purpose. These infirmities exist also in the writ.

The said judgments merely adjudge that the plaintiffs, the petitioners in this proceeding, recover such and such sums, with an appended command in the nature of mandatory order for a levy of taxes to pay and satisfy them. If they are based upon bonds and coupons existing under the statute of which Sec. 343 forms a part, the remedy is found in that statute, which is in a sense special, but if based upon a common debt of the county, the petitioners are mere common creditors, without right to the special levy which they have obtained in an *exparte* proceeding.

These general theories as well as those set forth in the eight paragraph of the said motion are based upon the following ideas of the law: 1st, that the court can so far inquire into a judgment rendered against a county as to ascertain if the claim is legally payable out of taxes sought to be applied to its payment; 2nd, that a claim against a county, merged into judgment, carries with it into its altered state all the infirmities of want of authority in the county commissioners to levy to pay such claim; and 3rd, if the county commissioners have no authority to levy a tax to pay a claim against a county, they have no authority to levy a tax to pay a judgment resting on such a claim.

Railroad Companies vs. Territory of New Mexico, 72 *Pac.* 14.

Brownsville vs. League, 129 *U. S.* 505.

Admitted, the pleadings do not show that the items upon which the judgments were rendered were for county current expenses; that the petition and writ refer to "certain coupons," and that the motion aforesaid, in the eighth paragraph thereof proceeds upon the notion that certain bonds are behind the judgments, but on the contrary the judgments, which are exhibits to the respective petitions

and writs are in form mere formal judgments for money recovered. They do not disclose the law pretendedly authorizing them, and the respondent had no chance to make an issue of any kind. The right to a levy for the payment of the said judgments ought to have been inquired into, on general grounds, in addition to more particular grounds to be shown herein.

Neither the petition nor the writ makes known any demand on the respondent for the levies which the court afterwards ordered. They do allege failure and refusal on their part "to make any levy whatsoever for the year 1905 for the purpose of raising funds to pay the aforesaid judgments and the interests and costs therein." The best that can be said in favor of this form of allegation is that the use of the word "refusal" imports a demand; whether one were made or not the inference might be drawn, but it would be unauthorized. The averment of demand is entirey omitted. It is an essential to the statement of a cause of action, the omission of which lays the petition and writ open to demurrer which is not waived by the respondent's motion, under the code.

The petition in question was filed, and the writ issued, on August 22, 1905. They were affected by Sec. 6, Ch. 14, L. 1905, and thus brought under the provision of the code of civil procedure, sub-section 39, that the objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by failure to plead by answer or demurrer, even though opportunity to answer or demur has been given the respondent.

It might seem that there is an element of unfrankness in the argument that the judgment for the enforcement of which the writ of mandamus exists might rest upon current expenses, but, disclaiming any intention to be disingenuous, the purpose of the argument is to suggest one point of view from which a hearing should have been had and from which the peremptory mandamus in the first instance was improper.

II.

There Should Have Been Demand Before Suit.

In every case of an application for a writ of mandamus

based upon private interest, a prior demand upon an officer should be alleged and proven. Here a private interest is concerned.

Spelling Ex. Rem., secs. 1381, 1447.

III.

The Action Should Have Been Directed Against the Treasurer and Not Against the County Board.

By the motion it is shown that on February 7, 1901, pursiant to the writ of mandamus issued out of the District Court for Santa Fe County, the said Board of County Commissioners, for the same object as is sought by the present writ made a levy of eighty-two mills and certified the same to the treasurer and ex-officio collector of said county, directing him to place the same on the county tax rolls and proceed immediately to collect the tax. The record does not show, except inferentially, that the levy has not been collected, but it exists as a lien upon the tax bearing property of the said County of Santa Fe. This existence being shown, the next step is collection, a duty pertaining to an entirely different official than the respondent herein. It is alleged that the respondent "has wholly failed to collect any sum whatsoever from taxes or otherwise for the payment of said judgment." Adroitly the petition fails to state that no levy for the purpose aforesaid was made by the respondent. This in truth it could not do. But why is the averment made that "the respondent has failed wholly to collect any sum whatsoever from taxes or otherwise for the payment of said judgment." The respondent is not the tax gatherer. Its duty in relation to taxes is to supervise the assessment and levy the tax. The collector is an entirely different functionary, and if there has been default it is the latter's and not the former's. If the tax required is only for current expenses, the duty of said board is prescribed by section 4021, C. L. 1897, "To levy taxes for the current expense purposes for the year 1898 not to exceed four mills on the dollar, and annually thereafter not to exceed three and one-half mills on the dollar, upon the assessed value of all taxable property," but no word anywhere that it shall gather it or su-

pervise the gathering thereof. A two mill levy for current expenses would be illegal therefore. If the collector negligently or wilfully fails or refuses to collect any of the taxes, the penalty under the general law, is on his bond, by section 4062, C. L. 1897, as amended by section 9, chapter 22, L. 1899. If the tax which he refuses or fails to collect arises under the act of 1891, then section 343 of the C. L. 1897, prescribes the procedure and penalty to be the appointment by the court of a person to perform the duty. The court's power in this respect cannot be invoked until there has been failure on the collector's part to collect taxes for the payment of interest or to perform some other duty enjoined by the act. And, further, the court cannot by mandamus under that statute enforce the performance of the duty until it has replaced the collector in the manner provided. In this section, the issuance of the writ of mandamus was premature for the foregoing reasons, and was therefore unauthorized, if indebtedness on account of bonds or coupons, as evidenced by a judgment, be its foundation. In fine with the outstanding levy of eighty-two mills, with its consequent lien, if it is valid, the judicia relief should come by process directed to the collector to cause him to do which he has left undone, and not by process directed to the county commissioners to cause them to do that which they have already done.

Bass vs. Taft, 137 *U. S.* 752.

Ex parte Rowland, 104 *U. S.* 615.

The former citation is peculiarly pointed for the law and the facts upon which that decision proceeds are substantially the same as those with which the court has to do in the case at bar, except that there it was the statutory duty of the county court to levy the tax, and coupled therewith was the power to name a special collector to collect it, while here it is made the duty of the county board to levy the tax only, and of the collector to collect it, or, under specific conditions, which might arise under the said section 343, of the court to nominate a special collector in lieu of an inert officer. In the case first cited this language is used: "As it appears that the defendant levied the tax in question and appointed Gaddie a special col-

lector of it, the defendant had exhausted his authority. * * * The only matter in which the defendant Bass was interested was as to that part of the judgment which compelled him to perform the alleged duty. It being clear that he had performed all the duty which was enjoined upon him by the statute, the judgment of the circuit court must be reversed as to so much of it as holds the answer of the defendant insufficient in regard to the appointment of a collector."

The respondent on general grounds, and particularly in view of the form of the peremptory writ of mandamus prayed for, should have been heard, that is, on account of the ministerial discretion and official judgment to be exercised, on account of the outstanding levy of eighty-two mills, of which the court judicially and actually must have known, and on account of the necessity for demand of performance, the lack of allegation to that effect.

Where the facts are disputed, a peremptory writ can not issue in the first instance.

13 Enc. Pl. & Pr.: 772.

How it was to be ascertained without a hearing or a return to the alternative writ of mandamus, or default of such return, prior to the issuance of the peremptory writ, whether or not there was a dispute of fact in this matter, it is hard to understand. But the motion praying for a hearing, showed that a controversy existed and an issue would be framed, if an opportunity to that end were afforded. A substantial question would arise, for instance, as to the need of a writ in view of the outstanding levy of eighty-two mills, which, it must be presumed, was ample for the discharge of the said basic judgments. Under the doctrine of Bass vs. Taft, *supra*, it is presumed, under the statute, that the County Commissioners had levied taxes sufficient for the purposes involved, and that the tax was collected. Here the case is stronger for the respondent, as the Board of County Commissioners levied a tax of eight and a fifth per cent in conformity with the court's adjudication. If, therefore, there is presumption at all it must be stronger here than it was there. The respondent was allowed no room to show the existence of that levy or what was the result thereof, but, without proof, the

court must have assumed that no sum of money whatsoever was collected thereon—an assumption which is untrue. Then again, the amount of the levy was one which called for the exercise of official judgment. It is to be recalled that the order for the levy of 82 mills, required such levy to be made until the alleged debt and interest would be paid, Tr. p. 10, sub-section (C). Case No. 230.

The relator's right to an immediate peremptory writ must be clear, before it will issue, and it must appear that the respondent has no valid excuse for not performing the act sought to be compelled.

13 Enc. Pl. & Pr., pp. 773, 774, 775.

If an issue of fact is probable, an alternative, not a peremptory, writ should issue.

13 Enc. Pl. & Pr., p. 775, n. 3.

That such probability in this case existed cannot be gainsaid. The court itself could see the need therefor from an inspection of the pleadings, in view of the amount of levy demanded, its knowledge of the eighty-two mill levy, the lack of demand, the omission to allege the taxable values of the county and the like.

In addition to authorize in the first instance the issuance of the peremptory writ, the relator's pleading must be good, but the petition and writ in this case are bad at least for lack of allegation of demand and for lack of allegation of the county's taxable values, as essential elements to a cause of action and, upon an ex-parte proceeding, as essential to advise the court of the sum requisite to be raised for the purpose intended.

State vs. Goodfellow, 1 *Mo. Ap.* 145.

IV.

The Supreme Court of New Mexico Had No Jurisdiction to Modify the Judgment of the Lower Court By Changing the Theory and Cause of Action.

The District Court has exclusive original jurisdiction

in all cases of mandamus, except where such writ is directed to a district court or judge thereto. * * * An appeal lies to the Supreme Court as in other civil actions.

C. L. 1897, *secs.* 2771, 2772.

"In all cases now pending in the Supreme Court or which may be hereafter pending in the Supreme Court and which may have been tried by the equity side of the court, or which may have been tried by a jury on the common law side of the court, or in which a jury may have been waived and the case tried by the court or the judge thereof, it shall be the duty of the Supreme Court to look into all the rulings and decisions of the court which may be apparent upon the records, or which may be incorporated in the bill of exceptions and pass upon all of them and upon the errors if any shall be found therein, in the rulings and decisions of the court below, grant a new trial or render such other judgment as may be right and just, and in accordance with law; and said Supreme Court shall not decline to pass upon any question of law or fact which may appear in any record either upon the face of the record or in the bill of exceptions, because the cause was tried by the court or judge thereof without a jury, but shall review said cause in the same manner and to the same extent as if it had been tried by a jury."

C. L. 1897, *sec.* 897.

This is the only law of New Mexico authorizing a different judgment on appeal from that rendered below. Even if the power given is applicable at all, it is applicable only to the cases recited. Mandamus does not come within the statute, for it is not a case tried on the equity side of the court, nor is it one tried on the law side with a jury, nor is it one in which a jury has been waived and trial had by the court or judge, especially as concerns the present proceeding.

The Supreme Court of New Mexico, in Territory vs. County Commissioners, 5 N. M. 17, declined to pass upon the question whether a mandamus proceeding should be submitted to a jury, but held that there was an implied waiver of a jury. However, the respondents have not

made such waiver in this issue. Hence, the Supreme Court lacked the power which it assumed to have to modify the judgment.

There is no statute in this Territory providing for jury trials in mandamus proceedings. The common law procedure governs.

State vs. Suwannee County, 21 *Fla.* 19.

Castle vs. Lawlor, 47 *Conn.*, 340.

The jurisdiction of the Supreme Court of New Mexico in the action under consideration was simply to affirm or reverse and remand for it was "as limited by law."

Sec. 10, *Act Sept.* 30, 1850, *Establishing the Territory of New Mexico. C. L.* 1897, *p.* 43.

V.

The Remedy Given By the Statute, Sec. 343, Compiled Laws of 1897, is Exclusive.

The statute declares: "Due and sufficient provision for the payment of the interest semi-annually accruing on all bonds to be issued under this act shall be made in each and every year by the authorities authorized by law to assess and levy taxes, in any county, city or other municipality, respectively concerned, and in case of failure to make such due and sufficient provision in any general tax levy, such authorities shall immediately make a special tax levy adequate for such provision; and in case of failure on the part of any officer or authorities legally and adequately to assess property and levy and collect taxes for the payment of such interest according to the intent of this section, or to perform any duty hereby enjoined or in case of absence, neglect or refusal on the part of any such officer or authorities, in respect to any duty or duties aforesaid, or in case of any vacancy in any office concerned in effectuating the intent of this section, the District Court, in and for said County, either in term time or in vacation, shall nominate and authorize some person or persons to discharge such neglected or unperformed duty or duties and shall

immediately enforce the performance thereof."

This is not merely a cumulative remedy, for the right, liability and remedy are created by the same enactment, and therefore the remedy given must be pursued.

Fourth National Bank vs. Franklyn, 120 *U. S.* 751.
7 *Ency. Pl. & Pr.* 372, 373, *n.* 1.

If there were established but a new remedy for a pre-existing right, the rule would be otherwise.

7 *Ency. Pl. & Pr.* 373, *n.* 2.

The extent of the summary foreclosure of defence will thus be seen.

VI.

Pleading Upon Information and Belief is Insufficient Where the Pleader is Presumed to Have Knowledge of the Fact.

It is only upon information and belief that the relators alleged, in their petition, that the respondents "wholly failed to collect any sum whatsoever from taxes or otherwise for the payment of the said judgments." But this form of averment is bad where the petitioner has knowledge or means of knowledge of the actual fact. The records were his as well as the county's. Indeed, the county officers in charge of those records were mere instrumentalities for the public convenience. The public had access to them. So did the relators and the relators' attorneys.

The rule is that when the fact is presumptively in the knowledge of the plaintiff or defendant, as the case may be, speaking specifically, an allegation on information and belief is insufficient.

Jones vs. Pearl Mining Co., 20 *Colo.,* 423.

Nichols, etc., Co. vs. Hubert, 150 *Mo.,* 620.

The objection should probably be made by motion directed to the defect. But no room for a formal pleading was given, and what was filed was a helter-skelter document,

made in a hurry, and without means or chance of study or precision, in every detail, as the promptness of the filing and the involution of the language in places would suggest. The purpose of the motion was to obtain leave to answer. The motion was not an answer submitted.

VII.

The Counties of Rio Arriba and Torrance Were Necessary Parties to a Complete Determination of the Case.

This point was decided in the negative in Missouri where in State vs. Burkhart, 59 Mo. 75, it was said: "The general provisions of the practice act, authorizing all persons having or claiming an interest in the subject matter of the controversy to be made parties plaintiff or defendant do not apply, for the reasons stated," that mandamus was not within the code. But with us it is different.

This proceeding is against the County of Santa Fe upon judgments obtained against it at a time when there was included in it the precincts of Moriarty, now a part of Torrance County, and the precinct of Espanola, now a part of Rio Arriba County.

Sub-section 5, C. L. 1897, the code, provides that "any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff, and who is a necessary party to the complete determination or settlement of the question involved therein." See also sub-section 6 of the code. Sub-section 7 of that Act declares that "Every person who shall have a cause of action against several persons * * * and who shall be entitled at law to one satisfacton therefor may bring suit thereon jointly against all or as many persons liable as he may think proper." By sub-section 175 of the code the proceeding in mandamus was excluded from its effect. Section 6, Ch. 114, L. 1905, incorporates the said proceeding within the code. The Counties of Rio Arriba and Torrance are therefore necessary parties to the complete determination or settlement of the question involved therein. As a matter of fact there is but one responsible party, if there is any, to-wit the County of Santa Fe but in legal intendment it would seem that the separation of the said two precincts ought not to affect the status of the debt. Still Santa

Fe County cannot make a levy in place of Rio Arriba and Torrance Counties. It is a corporate debt, if debt at all, which is in question, which the corporation itself or the Legislature cannot pass to any municipality. It stands or falls as a whole. The security is joint, not specific, to-wit, all the taxable property of the County of Santa Fe as it was at the date when the indebtedness came into being *prima facie*. Payment cannot be exacted from a part and excluded as to a part, for otherwise by further subdivision of the County of Santa Fe but one of its present precincts might remain within its boundaries and a levy upon such precinct would be, in conceivable senses absurd. This is not a cause or right of action, jointly or severally, against divers parties for one satisfaction, but it is a right, if right it be, against one party, the County of Santa Fe, as it was at the date of the issuance of the bonds, represented by several agencies the Boards of County Commissioners of the Counties of Santa Fe, Rio Arriba and Torrance.

Torrance County was created by Chapter 70, L. 1903, approved March 16, 1903, effective January 1, 1905. The precinct of Espanola was subtracted from the County of Santa Fe and added to the County of Rio Arriba by Chapter 24, L. 1903, approved March 10, 1903.

Chapter 20, L. 1903, approved March 10, 1903, provides for taxation of the territory erected into a new county or added to an old county.

VIII.

Assuming the Right to Discuss the So Called Railroad Aid Bonds, is the Act of Validation Enforcible?

June 8, 1878, Congress passed Ch. 168, 20 Stats. at Large ,explanatory of section 1889, R. S. U. S. By it municipal corporations in territories were prohibited thereafter to incur any indebtedness or obligation other than such as should be necessary to the administration of its internal affairs. This Act is construed in Lewis vs. Pima County, 155 U. S. (L. Ed.); 67, where it is held that such as those referred to herein, as the basis of the judgments in question are void as in conflict with the said Act. February 1, 1872, the Legislative Assembly of New Mexico enacted a statute having for its purpose the grant

of authority to issue such bonds, railroad aid bonds, as they are commonly known, and some twenty months after the passage of the prohibitory Act of Congress of June 8, 1878, the said fundamental bonds were issued by the County of Santa Fe. They were held valid by the Supreme Court of New Mexico in Coler vs. Board of County Commissioners, 6 N. M. 88, but the said Act of Congress does not seem to have been invoked in any manner against them. Whatever may have been the theory upon which this court acted, Lewis vs. Pima County, *supra*, had not been decided. Subsequent to the rendition of the latter decision these bonds were recognized as invalid. In view of this judgment of the Supreme Court, and possibly to remove its effect, on the 16th of June, 1897, Congress passed Ch. 30, p. 487, 29 Stats. at Large. Its sections important to this inquiry are found at pages 488 and 489. The validity of this statute came on for consideration before the Supreme Court of the United States in Utter vs. Frankln, 172 U. S. (L. Ed), 498, not directly, but indirectly, or, to express it otherwise, as a matter of analogy. The question determined was simply that Congress had the power to validate a Terrtorial statute otherwise invalid because contrary to some Congressional legislation. This issue is therefore at rest. There still remains, however, for consideration the question as to whether or not the said statute in fact validates the so-called Coler or railroad aid bonds of the County of Santa Fe. The Coler decision aforesaid, 6, N. M. 88, did not pass, however, upon the railroad aid bonds which were issued under the territorial act of February 1st, 1872, but did pass upon refunding bonds issued to take up the originals under the Act of the Legislative Assembly of New Mexico approved February 26th, 1891, Secs. 340 *et seq.*, C. L. 1897. Under the said act approved February 26, 1891, there were issued, in one batch to W. N. Coler & Co., September 29th, 1891, $262,000 of bonds, another batch dated March 1st, 1892, to Moore & Schley, $172,300 of bonds, and in yet a third batch to ———— Elston $6,300 of bonds, all refunding. The Coler bonds of 1891 refunded the New Mexico and Pacific Railroad aid bonds of 1880, and the Moore & Schley and Elston bonds of 1892 refunded the Texas, Santa Fe and Northern Railroad aid bonds of 1887.

Ch. 30 of the Congressional Act of 1897, 29 Stats. at

Large, 488 pretends to validate "The certain bonds and indebtedness, $172,500 in amount, together with the interest coupons thereto attached, of the County of Santa Fe, Territory of New Mexico dated March 1, 1892, issued under the provisions of an Act of the Territorial General Assembly known as the refunding act." This is the descriptive matter from which the respondent and tax agencies of the County of Santa Fe must find their guide. But it is not sufficiently clear to authorize them to proceed. There was no issue of bonds of $172,500 in amount dated March 1st, 1892. There was apparently an issue of $178,-600 in bonds of that date. In view of such discrepancy what bonds, if any, are validated. This the county officers cannot decide, for whose bonds shall be accepted and whose rejected, they are powerless to determine; whose interest coupons shall be honored and whose dishonored they cannot tell.

This act of pretended validation was doubtless drawn at the instance of the proposed beneficiaries thereof, and should be construed most strongly against them. It would have been easy in the interest of precision, to have identified the validated bonds by reference to their numbers. Other words of description are: "Issued under the procisions of an Act of the Territorial General Assembly known as the Refunding Act." If reference by this terminology is had to the common or colloquial designation of refunding statutes, it is not sufficiently specific to indicate any particular act of that class, as many such existed at the time of the passage of the congressional enactment. If in the mind of the draughtsman of the statute, at the time, was the territorial act approved February 26, 1891, his mental state has not sufficiently been made known to be an index for the county officers, for that act is called "An Act for the Financial Relief of Counties and Municipalities." Nor is the further matter of description sufficient: "Such bonds having been issued in refunding and in lieu of $150,000 of bonds, and the overdue interest thereon, of said County of Santa Fe, theretofore issued and outstanding," for at least $616,000 of refunding bonds had been issued and were outstanding prior to March 1, 1892. Again certain bonds and indebtedness together with the interest coupons *thereto attached* were proposed to be validated. *Detached coupons* were not to have the benefit of

validation. These are all matters of contest which the respondent should have had an opportunity to bring to the court's attention, and despite the formal deficiencies of the motion for leave to be heard, in view of the issuance of the peremptory writ of mandamus in the first instance, this court ought to have considered the substance, and not the form, in order that justice might be furthered for the public good.

Under the same act of Congress there was attempted to be validated "also all certain bonds and indebtedness, together with the interest coupons *thereto attached* of the County of Santa Fe, Territory of New Mexico, dated September 29, 1891, issued under the provisions of an Act of the Territorial General Assembly of the Territory of New Mexico, entitled 'An Act for the Financial Relief of Counties and Municipalities' approved February 26, 1891, such bonds having been issued in refunding an din lieu of $150,000 of bonds. the overdue interest, and the judgment rendered thereon of said County of Santa Fe, theretofore, in the year 1880, issued and outstanding." As to these latter the description would seem to be clear enough to effectuate the validation intended by Congress, but this admission is not to be construed as a waiver of the other defenses. Case No. 1122 concerns the so-called bonds dated, as it is said, September 29, 1891. Case No. 1123 concerns the bonds dated, as it is said, March 1, 1892.

The appellant admits that where the law is plain, no issue of fact being involved, a peremptory writ of mandamus is authorized in the first instance, but the references to the validation acts are thrown in as additional reasons to show that in this case a peremptory writ of mandamus was not soundly issued.

Respectfully submitted,

A. B. RENEHAN,
Attorney for Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1908

The Board of County Commissioners of Santa Fe County, Appellants,
vs.
The Territory of New Mexico, ex rel., Bird S. Coler, et al., Appellee.

No.------

Appeal from the Supreme Court of the Territory of New Mexico.

On the 24th day of September, A. D. 1900, the relators, Bird S. Coler and Elverton T. Chapman, recovered two judgments against the Board of County Commissioners of Santa Fe county, in the Territory of New Mexico, one for the sum of seventy-four thousand three hundred and fifty-eight and 17-100 dollars, and the other for the sum of sixty thousand nine hundred twenty-six and 02-100 dollars.

On the 25th day of January, 1901, the District Court

of Santa Fe county, by a peremptory writ of mandamus directed the County Commissioners of Santa Fe county to levy a tax of 82 mills on each dollar of the taxable property in said county for the purpose of paying the aforesaid two judgments.

The levy was made as directed, but no part thereof was ever paid, nor did the county authorities take any steps to compel the taxpayers of the county to pay the levy.

Each of the two judgments when recovered against the county carried interest thereon at the rate of 5 per cent per annum until paid, and on August 22nd, 1905, the sum of $32,874.05 had accrued as interest on said judgments, which said sum at that date was due relators, together with the original amount evidenced by the judgments.

On August 22, 1905, relators filed their petition for a writ of mandamus, directed to the Board of County Commissioners for the purpose of compelling a levy of ten mills additional to the 82-mill levy, which ten-mill levy was to be collected for the payment of the additional amount due as interest on said two judgments.

The court awarded relators a peremptory writ of mandamus and thereby directed the Board of County Commissioners to make a ten-mill levy, the proceeds of which were to be applied to the payment of said judgments.

Afterwards appellant Board of County commissioners filed its motion for a rehearing in the cause. The court overruled this motion and appellant appealed to the Supreme Court of New Mexico. The appeal resulted in the affirmance of the judgment of the District Court. No findings of fact were made by the Territorial Supreme Court and consequently there is nothing in these causes upon which to base a reversal of the judgments of the Supreme Court of New Mexico.

Armijo vs. Armijo, 181 U. S., 558-61.

The power of the court to issue its peremptory writ directed to the Board of County Commissioners is conferred by Section 2764 of the Compiled Laws of New Mexico for the year 1897 which provides: "When the right to require the performance of the act is clear and it is apprent no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. * * * *"

Here the duty to perform the act was clear and no valid excuse for the refusal of the performance of the act could have been given. Indeed, appellant by its motion for a rehearing attempted to give reasons why the writ should not issue and it was obvious to the court that the reasons submitted and put forward in the motion were not sufficient. Mandamus was the only remedy the judgment creditors had whereby payment of their judgments could be effected. Execution not only was not the proper remedy, but was specifically withheld from them by the laws of New Mexico.

Section 657, C. L., N. M., 197, provides: "When a judgment shall be rendered against any Board of County Commissioners of any county * * * * where the same shall be paid by the county, no execution shall issue upon said judgment, but the same shall be levied and paid by tax as other county charges. * * * *"

It has been repeatedly held by this court that mandamus is the proper remedy of a judgment creditor to collect a judgment against a county or municipal corporation.

> Mobile vs. Watson, 116 U. S., 289.
> East St. Louis vs. United States, etc., 120 U. S., 600.

Mandamus to enforce the payment of a county or municipal judgment is not a new suit, but becomes a substitute for the ordinary process of execution.

Washington County vs. United States, etc., 9 Wall, 415.

Appellant by its motion for a rehearing attacked the validity of the bonds, the unpaid coupons of which were the basis of the judgments, which the commissioners were directed to pay by this mandamus proceeding, and reiterates the same attack here. If the Board of County Commissioners had any valid defense which could have been asserted against the bonds or coupons, such defense could not be of avail in this proceeding. The judgments are *res adjudicatae* as to such defense and cannot be impeached in this collateral manner.

Supervisors vs. United States ex rel., 4 Wall, 435.

It is contended by appellant that the new levy could not rightfully have been ordered by the court, because an unpaid levy of 82 mills was still outstanding; but the new levy was ordered to pay the sums of money which became due and accrued since the 82-mill levy was made, and was not ordered for the purpose of compelling the payment of the judgment indebtedness that existed January 25th, 1901.

See opinion of Supreme Court of New Mexico herein

Other contentions of appellant challenging the correctness of the judgment of the Supreme Court of New Mexico herein are so manifectly without merit as to require no consideration.

Respectfully submitted,

CHARLES A. SPIESS.

COMMISSIONERS OF SANTA FÉ COUNTY *v.* TERRITORY OF NEW MEXICO EX REL. COLER.

SAME *v.* SAME.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

Nos. 42, 43. Submitted November 29, 1909.—Decided December 20, 1909.

Although a defense to the merits if pleaded in the original action might have prevented rendition of the judgment, it cannot be urged to prevent mandamus from issuing to enforce the judgment.

Under the laws of New Mexico, where there is no possible excuse for a board of county commissioners not to comply with a judgment, a peremptory writ of mandamus in the first instance is authorized.

Where the bill shows it is clearly the purpose of defendant officers not to perform a duty imposed upon them, demand is not necessary before suit for mandamus.

Where parts of a county have been detached by statute which provides for the detached portions bearing their proportion of indebtedness, the counties to which those portions are attached are not necessary parties to a suit to recover obligations of the original county. After judgment the original county which is primarily liable may enforce contribution through the proper officers for the proportionate share of the detached portions.

In this case it was held that the facts justified the amount of the tax levy required by the writ of mandamus as modified by the Supreme Court of the Territory.

Practice of the courts in a Territory is based upon local statutes and procedure and this court is not disposed to review the decisions of the Supreme Court of the Territory in such cases, and, following the Supreme Court of the Territory of New Mexico, this court holds that the power of that court to affirm or reverse and remand includes the power to modify, and extends to proceedings in mandamus.

14 New Mexico, 134, affirmed.

THE facts are stated in the opinion.

Mr. A. B. Renehan for appellant:

The peremptory writ of mandamus should not have been issued without a hearing or opportunity for respondents to be heard. The writ is confined to the requirement of official duties of a ministerial character. 2 Spelling, Ex. Rem., §§ 1432–1434, 1437.

The court in mandamus proceedings can inquire into the original judgment so far as to ascertain whether the claim is legally payable out of the taxes sought to be applied. *Railroad Co.* v. *New Mexico*, 72 Pac. Rep. 14; *Brownsville* v. *Loague*, 129 U. S. 505.

The mandamus cannot be issued as there was no demand before suit. Spelling, Ex. Rem., §§ 1381, 1447. The action should have been directed against the treasurer of the county and not against the county board. Sections 4021, 4062, C. L. 1897; and see § 343; *Bass* v. *Taft*, 137 U. S. 752; *Ex parte Rowland*, 104 U. S. 615.

Where the facts are, as in this case, disputed, a peremptory writ cannot issue in the first instance. 13 Ency. Pl. & Pr. 722;

and see also 13 Ency. Pl. & Pr. 773-775; *State* v. *Goodfellow*, 1 Mo. App. 145.

The Supreme Court of New Mexico had no jurisdiction to modify the judgment of the lower court by changing the theory and cause of action. Under C. L. 1897, § 897, the power of the appellate court is limited to revising or modifying a judgment only in actions at law or equity and not in such proceedings as mandamus. *Territory* v. *County Commissioners*, 5 New Mex. 17. There being no statute in the Territory providing for jury trials in mandamus common-law procedure governs and the Supreme Court can only reverse or affirm. *State* v. *Suwannee County*, 21 Florida, 1; *Castle* v. *Lawler*, 47 Connecticut, 340; and see § 10, C. L. 1897, p. 43, act of September 30, 1850.

The remedy given by the statute, § 343, C. L. 1897, is exclusive. *Fourth Nat. Bank* v. *Francklyn*, 120 U. S. 751; 7 Ency. Pl. & Pr. 372.

The pleading being on information and belief is insufficient as the pleader had knowledge of the facts. *Jones* v. *Pearl Mining Co.*, 20 Colorado, 417; *Nichols* v. *Hubert*, 150 Missouri, 620.

The counties of Rio Arriba and Torrance were necessary parties under the existing laws of the Territory. Subsection 5, C. L. 1897, subs. 175; § 6, ch. 114, L. 1905; ch. 70, L. 1903; ch. 24, L. 1903; ch. 20, L. 1903.

Under the act of June 8, 1878, c. 168, 20 Stat. 101, explanatory of § 1889, Rev. Stat., the Territory was prohibited from issuing these bonds. *Lewis* v. *Pinia*, 155 U. S. 67. Although held valid in *Coler* v. *County Commissioners*, 6 New Mex. 88, the question of their validity under the act was not raised. The validating act of June 16, 1897, c. 30, 29 Stat. 487, although construed in *Utter* v. *Franklin*, 172 U. S. 498, does not validate these bonds as it is too indefinite to determine which bonds are validated. There is no element of *res judicata* in this case. The judgments are not attacked, only the method of enforcement and the excessive amount of the

levy. *Railway Co.* v. *Territory*, 72 Pac. Rep. 14; *United States* v. *Macon County*, 99 U. S. 591; *Brownsville* v. *League*, 129 U. S. 502.

Mr. Charles A. Spiess for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

These appeals are prosecuted to review judgments of the Supreme Court of New Mexico, modifying, and affirming as modified, judgments of mandamus of the District Court of Santa Fé County, commanding the appellants to levy a tax of ten mills in each case on each dollar of taxable property in the county, to pay certain judgments for the amount of principal and interest upon bonds issued by the county. The cases are here on separate records, but as they are submitted together we dispose of them, as the Supreme Court of the Territory did, in one opinion.

The proceedings were commenced by petitions, which are alike, except as to the amount of the judgment recovered. In No. 42 it is alleged to be $60,926.02; in No. 43 it is alleged to be $74,358.19. Both judgments were recovered in the District Court of the county in which the petitioners (appellees here) were complainants and the board of county commissioners were defendants. It is alleged that the judgments ordered the sums due as above stated, and the interest thereon to become due at five per cent per annum from the date of the judgments, "to be assessed and levied upon and out of the taxable property situate in the said county of Santa Fé, and to cause the same to be collected in the manner provided by law, and to pay the same out of the treasury of said county to the said complainants, their legal representatives or assignees, upon the delivery of a proper voucher therefor." Default in the payment of each of the judgments and its requirements is alleged, and that the board held a meeting during the month of July or August, 1905, and made a levy

for various territorial purposes, but "wholly failed and refused to make any levy whatsoever, and still fail and refuse to make any levy whatsoever, for the said year of 1905, for the purpose of raising funds to pay the aforesaid judgment and interest and costs thereon." The want of a plain, speedy and adequate remedy at law is also alleged. Peremptory writs of mandamus were issued without a hearing.

Subsequently the appellants filed a petition in each case in the District Court and prayed "that the peremptory order be suspended herein, and that they be permitted to show cause and be heard before the order and writ are made permanent."

To sustain this prayer they alleged that at the date of the rendition of the judgments of appellees all of the property within the county of Santa Fé subject to taxation was liable for the payment of its *pro rata* of the judgments; that the thirty-fifth legislative assembly "eliminated" portions of Santa Fé County, and attached them respectively to the county of Rio Arriba and the county of Torrance, and made them subject to their proportions of the indebtedness of Santa Fé County; that the taxable property situate therein is liable for its part of the indebtedness; that the county commissioners are without jurisdiction to levy and assess taxes upon it, and that the peremptory writs include only "the property and territory within the present boundaries" of Santa Fé, and do not pretend to include that in Rio Arriba and Torrance; that by a mandamus issued out of the district court on the twenty-fifth day of January, 1901, the county commissioners were required to levy a tax upon the taxable property in Santa Fé sufficient in amount to produce a sum of $135,284.19, with interest thereon from the twenty-fourth of September, 1900, until paid at five per cent per annum, and $30.00 costs, the said sum being for the amount of the judgments in cases 4091 and 4092 of the district court of Santa Fé County; that the board obeyed the writ and levied eighty-two mills on each dollar of taxable valuation, and

certified the same to the treasurer and *ex officio* tax collector of the county, and directed him to place the same on the tax rolls and collect in the manner provided by law; that the levy is still standing on the tax rolls of the county, and is a lien upon the taxable property of the county as then existing, and subject to the payment of the judgments; that the commissioners are without authority to enforce the same, and that the levy is ample and sufficient to cover the amount of the judgments in cases Nos. 4091 and 4092, and that the levy of ten mills in each case is largely in excess of the amount required, and is "unjust and unfair" to the taxpayers of the county of Santa Fé, and ruinous to its "progress and prosperity." It is alleged that the board is entitled to be heard on the amount of levy, or whether any levy should be ordered, as there exists a legal and adequate levy to cover the judgments; that it is impossible to determine the amount of levy necessary to be made for the year succeeding 1905 until the tax roll for that year has been completed and the amount of taxable property determined; that the board should not be held in default until the time shall arrive when the levy can be made, and they shall have failed to perform their duty; that the levy of the tax, as required by the writ, is not one which the law "enjoins as a duty resulting from an office, trust or station," because the levy of eighty-two mills, when collected, will be sufficient to pay the judgments, and that it is not a duty of the board to collect it, but "the duty of the treasurer and *ex officio* tax collector of Santa Fé County." It is alleged appellees have a plain, speedy and adequate remedy at law.

As an additional ground of the motions, it is alleged that the act of Congress, by which the bonds are "pretended to have been validated, approved, and confirmed, is indefinite, uncertain, and incapable of reasonable interpretation and enforcement, so as to be applied to any bonds issued by the county of Santa Fé," and does not sufficiently identify what bonds are intended to be validated, approved and confirmed;

nor what holders of the bonds, it being alleged that they "are subjects of different ownership and are not all in the hands of one person, and it cannot be determined from the said act of Congress what holder of said bonds, in excess of the amount named in the said act of Congress, shall not have the benefits of validation." And further, that at the time of the passage of the act of Congress there was more than one refunding act in force in the Territory, but what refunding act is referred to by the act of Congress is not disclosed.

The motions to suspend the peremptory writs were denied and the orders denying them were affirmed by the Supreme Court of the Territory. The latter court, however, modified the writs, as will be presently pointed out.

The assignments of error in the Supreme Court of the Territory repeated and emphasized the grounds urged in the motions to suspend the peremptory writs of mandamus. In this court the modification of the judgments by the Supreme Court of the Territory is attacked and some new contentions are made.

The case is submitted on briefs, and we shall not attempt to trace an exact correspondence of the arguments of appellants with the assignments of error, nor indeed shall we follow the details of the argument, but consider those matters only which we think can in any way affect the merits of the controversy. It will be observed in the beginning that the writs of mandamus issued by the District Court are but the execution by it of its judgments of the twenty-fourth of September, 1900, the amounts of which the board of commissioners were ordered to assess against the taxable property of the county and pay the same. We may say, therefore, at the outset that whatever could have been urged to prevent the rendition of the judgments cannot now be urged to prevent their enforcement. This disposes of the defense made against the orders under review, that the act of Congress validating the bonds is uncertain and indefinite, even if it had merit otherwise. The objections that are urged against the act of Congress are

that it cannot be understood from it what refunding act is referred to, there being two, it is contended, or whether all of the bonds issued under it have been validated or only an amount thereof, not exceeding $172,500.00, and if no more than $172,500.00, which bonds have been validated. And it is urged further that there is no identification of what holders of the bonds in excess of the amount named in the act of Congress shall not have the benefits of the validation. Manifestly such defenses should have been set up in the original actions and are now precluded by the judgments therein rendered. It is established by the judgments that the amount of bonds issued was in accordance with the act of Congress and was not excessive in amount, and also that the plaintiffs in the action (appellees here) were legal owners of such bonds and entitled to the "benefits of validation." *Murphy* v. *Utter*, 186 U. S. 95, 113. The appellants, therefore, are confined to the other objections urged by them.

The principal of these objections is that peremptory writs should not have been issued without a hearing, and that there should have been a demand made of the commissioners before suit. As to the first, it may be said that it probably appeared to the District Court that the board could have no possible excuse, and in such case a peremptory writ is authorized in the first instance by the laws of the Territory. By § 2764 of the Compiled Laws of New Mexico for the year 1897 it is provided that "when the right to require the performance of the act is clear, and it is apparent no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance."

The second ground is also untenable. The original judgments expressed the obligation of the board. They imposed the duty of levying taxes to pay them, and, it is alleged, that the board had levied taxes for other territorial and county purposes, but had failed and refused to make any levy whatever to pay the judgments. In other words, it is averred, that it is clearly the purpose of the board not to perform the

duty imposed upon it. In such a case no demand is necessary. *Northern Pacific R. R.* v. *Dustan*, 142 U. S. 492, 508.

We are therefore brought to the consideration of the sufficiency of the excuses which the board made in its motions to suspend the writs. We may briefly repeat them: (1) that portions of Santa Fé County were attached to other counties, which portions are subject to the payment of the judgments, and that the board is without jurisdiction over them; (2) that a levy of eighty-two mills had been made, which is a lien upon the property of Santa Fé County "as then existing," and that the board is without authority to enforce the collection of the levy; (3) that the levy of twenty mills (ten in each case) is excessive; (4) that the board was entitled to be heard as to the amount of the levy, or whether any levy was necessary, "there existing upon the tax rolls a legal and adequate levy to cover" the judgments which it is the duty of the tax collector to collect; (5) that it was impossible to determine the amount of the levy necessary for the year succeeding the year 1905 until the rolls for that year had been completed and the amount of taxable property determined; (6) that the board is not in default and should not be held liable until in default.

The District Court evidently considered that these excuses were without substantial merit, and such also was the view of the Supreme Court of the Territory. To the first, that is that the portions of Santa Fé County which had been segregated from it should have been included in the writs, it was replied by the Supreme Court that it was provided by Chapter 20 of the Session Laws of 1903 that such segregated portions were required to contribute their just proportion to the bonded debt of Santa Fé, that provision was made for assessment, levy and collection of such proportion by the officers of the new county upon the order of the old county, and that the money collected should be paid into the treasury of the old county. It was therefore decided that the county of Santa Fé could "compel contribution from the two other counties

which had received a portion of its territory, in proportion to the amount of taxable property received, and this is the method provided by law." This view of the statute is not directly attacked by appellants, and, if it may be said that the general argument is a criticism of it, the answer is what was said in *English* v. *Arizona*, 214 U. S. 359, 363, that "unless in a case of manifest error, this court will not disturb a decision of the Supreme Court of a Territory construing a local statute." Chapter 20 of the Session Laws of 1903 is an answer also to other contentions of appellants. If the county of Santa Fé is primarily liable for the bonds she is the proper party to an action upon them, and through her officers the payment of the judgments recovered can be enforced. The contention of appellants, therefore, that the counties of Rio Arriba and Torrance are "necessary parties to a complete determination of the case," is untenable, as indeed all other contentions that are based upon the addition to those counties of portions of Santa Fé County.

The most serious contentions of appellants are that the levy of eighty-two mills was sufficient to pay the judgments, interest and costs, and that the levy of twenty mills in addition was excessive. We think, however, that the reply made by the Supreme Court of the Territory adequately disposed of them. The learned court pointed out that the resolution of the board of county commissioners, a copy of which appears in the record, showed that the levy of eighty-two mills had the purpose only, and was sufficient only, to pay the then amount of the judgments, together with interest. It was further pointed out that the interest to accrue was not provided for, and that it amounted on the day when the peremptory writs of mandamus were issued to $32,874.05. It follows necessarily, as the court said, that the contention that the eighty-two mills levied was sufficient, "is unfounded and untrue in fact." To the contention that the twenty mills levied are excessive, in that they are more than sufficient to pay $32,874.05, the court replied that, if this were so, the

peremptory writs should not have been issued. But, the court added, it is not shown that the assessable value of property in Santa Fé County has increased, while it does appear on the other hand that portions of the county had been cut off; therefore, it was said, it is fair to presume "that the assessed valuation of the county is not in excess of what it was in 1901, when the eighty-two mills levy was made." From this presumption it was concluded that twenty mills would produce, if collected in full, $32,996.00, an excess only of $112.05. And it was observed that since the peremptory writs were issued interest had accrued to the amount of $10,000.00.

The writs required not only the levy of twenty mills for the year 1905, but for each and every year thereafter and until the judgments with interest and costs be paid. This the Supreme Court pronounced error, and modified the judgments by striking out the requirements for a continuous levy. This appellants assign as error, contending that the Supreme Court had no jurisdiction to modify the judgments of the lower court, and that by doing so it changed the "theory and cause of action." The argument to sustain the contention is somewhat roundabout. Exclusive original jurisdiction in mandamus, it is said, is conferred on the District Court by § 2771 of the laws of the Territory, and, while an appeal lies to the Supreme Court as in other civil actions (§ 2772), that the power of the court to modify the judgment of a district court, given by § 897,[1] does not extend to a judgment in

[1] "In all cases now pending in the Supreme Court or which may be hereafter pending in the Supreme Court, and which may have been tried by the equity side of the court, or which may have been tried by a jury on the common law side of the court, or in which a jury may have been waived and the case tried by the court or the judge thereof, it shall be the duty of the Supreme Court to look into all the rulings and decisions of the court which may be apparent upon the records, or which may be incorporated in the bill of exceptions, and pass upon all of them and upon the errors if any shall be found therein, in the rulings and decisions of the court below, grant a new

mandamus. The jurisdiction of the Supreme Court, it is urged, "was simply to affirm or reverse and remand." This, it will be observed, is very general. It would seem even to imply that the Supreme Court has not even the power of direction, but must leave the District Court to get right ultimately through successive judgments, appeals and reversals. And the anomaly is attempted to be sustained by saying that mandamus is not included in the useful power given to the Supreme Court by § 897 in cases taken to it to "render such other judgment as may be right and just and in accordance with law," because, it is said, that mandamus "is not a case on the equity side of the court, nor is it one tried on the law side with a jury, nor is it one in which a jury has been waived and trial had by the court or judge, especially as concerns the present proceeding." This is a misunderstanding of the statute. Its purpose is to not only give the power to review, but to prevent its defeat through the distinction between causes of action and modes of trial. Further argument is unnecessary. Even if the contention had grounds of support it would be answered by the case of *English* v. *Arizona*, 214 U. S. 359, and the case of *Armijo* v. *Armijo*, 181 U. S. 558, 561. In the latter case we said that practice "in the courts of the Territory is based upon local statutes and procedure, and we are not disposed to review the decision of the Supreme Court in such cases. *Sweeney* v. *Lomme*, 22 Wall. 208." Of the other contentions of appellants, it is enough to say that they are without merit.

Judgments affirmed.

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trial or render such other judgment as may be right and just, and in accordance with law; and said Supreme Court shall not decline to pass upon any question of law or fact which may appear in any record either upon the face of the record or in the bill of exceptions, because the cause was tried by the court or judge thereof without a jury, but shall review said cause in the same manner and to the same extent as if it had been tried by a jury."